

OME DISPUTED QUESTIONS

IN

DERN INTERNATIONAL LAW.

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ESSAYS
ON
SOME DISPUTED QUESTIONS
IN
MODERN INTERNATIONAL LAW,

BY

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PREFACE TO THE FIRST EDITION.

THE following Essays contain the substance of a course of lectures delivered at Cambridge in the Easter Term of the present year. My temporary position as Sir William Harcourt's Deputy in the Whewell Professorship of International Law gave me an opportunity of dealing, for the benefit of a few advanced students, with questions of little interest to men whose reading is confined to what is necessary for examination purposes. I had previously endeavoured to provide for the wants of the latter class by giving a more elementary course on the Laws of War.

So much has been added to the lectures since they were delivered that I have preferred to publish them in the form of Essays. A considerable amount of matter which would obviously have been unsuited to the lecture-room thus finds its way into print. I should not, for instance, have considered it possible to have retained the attention of my class, if I had asked them to listen to such a detailed examination of a diplomatic correspondence as is found in the second and third parts of the third Essay. The lecture upon the Panama Canal and the Clayton-Bulwer Treaty consisted of the first part of the Essay with that title, and a short account of

the American contentions with regard to the treaty together with a brief exposure of their hollowness. But in a book, which may be studied at leisure, I hope a fuller examination of the despatches of Mr Blaine and Mr Frelinghuysen will not be considered out of place. Though the Panama Canal question is not of immediate urgency, it will become most pressing and important, if it is not settled before the piercing of the isthmus has been successfully accomplished. Accordingly, I have endeavoured to consider it in all its bearings, not being content with merely setting forth its polemical aspects as between this country and the United States, but dealing with it historically and politically as well. I have also striven to fix the true sense of that very loosely used term *neutralization*; and in the concluding pages of the Essay I have suggested a practical plan for formally and legally neutralizing the canal.

It is with no small satisfaction that while I write I observe in two separate quarters a confirmation of views I have ventured to express. As against the American contention that the United States are able by their sole guarantee to protect the neutrality of the Panama Canal, I have argued that, quite apart from the legal difficulties in the way of the neutralization of a given spot by a single state, the great transatlantic Republic has not as a matter of fact the requisite power, it being confessedly inferior in naval strength to Great Britain. I am now able to quote a high American authority in support of this assertion. Commander Goodrich of the United States navy, in a recent official report on our Egyptian

Expedition of 1882, refers in eulogistic terms to the ably planned and well executed operations whereby our fleet seized the Suez Canal. He then adds, "The inference to Americans is obvious, that the neutrality of any canal joining the waters of the Atlantic and Pacific Oceans will be maintained, if at all, by the nation which can place and keep the strongest ships at each extremity." No doubt the gallant Commander is right, so far as physical force is concerned; but, with regard* to the legal aspect of the case, I have contended that all the states interested in the canal must concur in its neutralization, before the *status* of neutrality can be conferred upon it. Here again my view receives confirmation from current authority; for I see in the newspapers that the International Peace and Arbitration Conference, assembled at Berne early in the present month, resolved that a guarantee of all the maritime powers was necessary in order to effect the neutralization of interoceanic canals.

I have said that the Essays are greatly amplified lectures; and this is true of all except the fifth. When I came to revise it for publication, the subject appeared so great that a treatise would be required to deal with it completely. I have therefore been content to elaborate a little more fully one or two points which were the pivots of my argument, sending the rest of the lecture to press in almost the same form as it was delivered. The more the subject is investigated, the more, I believe, it will be found that the theory of the Primacy of the Great Powers is correct. I cannot claim to have estab-

lished it by an exhaustive examination of all the great diplomatic transactions of the present century ; but I have dealt in the Essay with a sufficient number of them to shew that the old doctrine of the equality of all independent states before the law is rapidly becoming unsuited to the facts of international intercourse in modern Europe, and that it ought now to be superseded by a new doctrine, which shall ascribe to the Great Powers the position of legal preeminence given them by their superiority in force and influence.

The various Essays are not so entirely disconnected as might appear from a perusal of their titles. The first certainly stands by itself, and deals with a question of Jurisprudence rather than of pure International Law. The second and third, if read together, will be found to contain an account, however imperfect, of the legal questions which gather round oceanic canals. The remaining three are united by the idea of Evolution as applied to International Law, and also by the theory of the Primacy of the Great Powers. In the fourth I have sought to shew the origin of the modern law of nations ; in the fifth I have pointed out how one of the leading principles of its founders is being rendered obsolete by the growth of events in our own times ; and in the sixth I have considered the subject of war in the light of the theory of Development, and have found reason for believing that a state of perpetual peace will be gradually evolved upon earth.

The second Essay appeared as a paper in the February number of the *Law Magazine and Review*,

and I have to thank the Editor for permission to republish it in the present volume. It appears now in a somewhat altered form ; and since it was in type events have occurred which would call for further alterations, were it possible to make them. The Great Powers have been summoned to discuss Egyptian finance. A Conference has met, and has separated without coming to any agreement. Everyone is asking what steps Great Britain ought to take in consequence, and there is a considerable weight of opinion in the country in favour of advising the Khedive to cancel by a decree the Law of Liquidation, and reduce the interest on the Egyptian debt. It may be urged that if such a course, or any at all like it, is adopted, the theory that the Great Powers must decide in the last resort upon the future position of Egypt will have received its death blow. I do not think so. Interference in favour of bondholders is a new thing in international affairs ; and the few cases in which it has taken place form examples to be avoided, rather than precedents to be followed. The political destination of Egypt is a very different matter. In spite of the failure of a Conference on what ought to have been from the first a matter of purely internal regulation, I hold as strongly as before that neither in fact nor in law can the destiny of Egypt be settled without the consent of the Concert of Europe. The Great Powers obtained possession of the Egyptian Question in 1839 and 1840, and they are not likely to loose their hold upon it in 1884.

Among the writers whose works I have made use of

the foremost place should be given to Sir Henry Maine. His *Early Institutions* suggested the line of thought worked out in the first Essay; and that portion of the fourth which deals with the influence of the theory of a Law of Nature upon the system of Grotius is little more than an elaboration of a passage in his *Ancient Law*. No one who reasons at all upon the problems of society and government can fail to receive invaluable assistance from his marvellous insight and comprehensive learning. My own obligations to him are many and great, and I wish to acknowledge them in the strongest terms. I have also to express my thanks to my friends, Mr Courtney Kenny and the Rev. J. E. Symes, for many useful suggestions, and to the gentlemen who attended my Conversation Class at Cambridge for hints and criticisms thrown out in the course of our discussions, and found by me afterwards to be valuable aids when I came to rewrite my lectures for the press.

T. J. LAWRENCE.

OBAN,

August 18, 1884.

PREFACE TO THE SECOND EDITION.

IN preparing a new edition of these Essays I have added considerably to the original text, and introduced a new Essay on the important subject of the Exemption of Private Property from Capture at Sea in Time of War. Holding as I do that the complete freedom of peaceful merchandise from hostile operations is not only desirable in itself, but absolutely essential to the safety of our vast commerce, and even to the continued existence of our Empire if we should be involved in war with a strong maritime power, I have endeavoured as a matter of patriotic duty to give expression to what appear to me the overwhelming arguments in favour of this view. Justly proud of its splendid navy, the British public rests in false security, expecting that its trade will flourish in a future war with as little molestation as it experienced during the struggle against Napoleon and his Continental Allies. It forgets that though there has been no falling off in the bravery and skill of its seamen and no deterioration in the quality of its ships, the conditions of international trade, the circumstances of warfare, and the rules which govern maritime capture have all been revolutionized since the beginning of the century. I

have tried to shew that the old methods cannot cope with new difficulties. There is for us but one way of dealing with them; and that is by restricting maritime capture of private property to cases of carrying contraband or breaking blockade.

The Essay on the Suez Canal has been almost rewritten to bring it down to the present time. The chief new feature in it is a reference to the Canadian Pacific Railway and the influence it should exercise upon our attitude towards the Egyptian Question. In the Essay on the Panama Canal I have struck out some severe remarks upon the two American Secretaries of State who conducted the late controversy with Great Britain. Mr Frelinghuysen is dead, and Mr Blaine has failed in his attempt to obtain the highest object of an American citizen's ambition. It is best, therefore, to be content now with pointing out the flaws in their arguments, without attempting to characterize their controversial methods, especially as President Cleveland's Administration has shewn no disposition to continue their policy.

The only other Essay in which I have made any considerable alterations is the first. It is the only one that has been seriously criticized by competent thinkers; and though they have not convinced me that my main position is unsound, they have caused me to restate it in what I hope are plainer terms, and to modify somewhat one or two subsidiary points. Since my examination of Sir J. F. Stephen's remarks on International Law was published, his son, Mr J. K. Stephen, has amplified his father's views with marked ability in a book called

International Law and International Relations. With much that he says in it as to method I am in entire sympathy, and I am glad to find running through the work a sense of the vast importance of the rules which govern the intercourse of civilized states. If we agree in the main as to the nature and method of our science, we need not differ seriously as to the name by which to call it. To me "The Science of International Relations" seems a clumsy substitute for the old, and, as I hold, correct term "International Law." I doubt whether it is likely to come into general use; and I certainly see no advantage in banishing from controversies between states ideas of legal right and legal wrong, and substituting for them such ethical and other considerations as the disputants happen to find convenient at the moment.

T. J. LAWRENCE.

DOWNING COLLEGE,
September 25, 1885.

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ESSAY I.

IS THERE A TRUE INTERNATIONAL LAW?

OUR modern English notions on the subject of the philosophy of law are influenced almost entirely by two great writers. The opinions that sounded strange and startling to the contemporaries of Bentham and Austin have become the commonplaces of the present generation. It is true that a few thoughtful scholars, such as Sir Henry Maine, Professor Clark, and others, have ventured to criticise them from various points of view; but at present their suggestions have produced little effect. The vast majority of people who reason at all upon such matters take for granted the Benthamite analysis of the nature of law, and the Austinian classification of the various kinds into which laws may be divided. They put them almost on a level with the fundamental truths of mathematics, regarding them as something that has been fixed, and settled, and proved to be accurate a long time ago, something that need not be examined and tested, but may be accepted and applied without the slightest doubt or hesitation.

One little noticed but very definite result of this condition of opinion has been to lessen the estimation

in which International Law is held by students of Jurisprudence. Few legal writers would speak of it as "A great and noble monument of human wisdom, founded on the combined dictates of reason and experience, a precious inheritance bequeathed to us by the generations which have gone before us, a firm foundation on which we must take care to build whatever it may be our part to add to their acquisitions, if indeed we wish to maintain and consolidate the brotherhood of nations, and to promote the peace and welfare of the world¹." Nor would many modern lawyers praise it as "a code matured by the wisdom and experience of ages," or declare that it had "materially advanced the civilization of Europe²." Instead of eulogies like these we get from judges and jurists such cold remarks as those which fell from the present Lord Chief Justice in his judgment on the *Franconia* case. "Strictly speaking," said he, "International Law is an inexact expression, and it is apt to mislead if its inexactness is not kept in mind." A similar note of depreciation is frequently heard, and it correctly indicates the general condition of legal opinion. It is no doubt true, as an able critic has pointed out³, that there is no incompatibility between the two views expressed in the quotations I have given. I refer to them not as being mutually opposed to one another, but as illustrating two divergent habits of mind. The men who in speaking of a given individual habitually dwell upon his real or supposed defects will hardly be reckoned among his friends. In the same way those who have

¹ Mr Gladstone's speech in the *Don Pacifico* debate. *Hansard* for 1850, Vol. CXII.

² Mr Disraeli's speech in the same debate.

³ Article in *Cape Law Journal*, April, 1885.

nothing but demonstrations of imperfection to apply to International Law may surely without injustice be charged with holding it in little esteem. Nor is this attitude much to be wondered at. The legal profession is constantly engaged in administering a system of positive law, embodied for the most part in definite rules proceeding from determinate authors, and enforced in the last resort by the whole force of the state, stored up in the hands of the executive authorities. It therefore comes to regard this law as the type of all law, and shows scant appreciation of any body of rules that is wanting in any of the characteristic features of the system with which it is most familiar. The lack of coercive force to compel obedience to a command is in its estimation a fatal flaw. It holds that precepts concerning conduct, which cannot be enforced by some determinate superior who, to use the phraseology of Austin, is able to bring evil upon the disobedient, are improperly termed laws, and therefore it regards them as altogether inferior to rules which have a definite punishment annexed to their breach. What is really nothing more than a question of classification is made into a question of praise or blame. When it is shown that International Law does not possess sanctions similar in kind to those attached to ordinary municipal law, it is assumed to have been thereby relegated to a lower level, and deprived of a position it had usurped among the aristocracy of the legal kingdom. Nowhere are the arguments in favour of this view presented in an abler and more attractive form than in Sir James Fitzjames Stephen's recent *History of the Criminal Law of England*¹. We

¹ Vol. II. ch. xvi.

will therefore examine the statements of the learned judge with the respectful attention they deserve; but before entering upon the task it will be necessary to discuss two or three preliminary points.

I. In the first place, we must bear in mind that one thing is not necessarily less useful than another because it is not exactly like it in all essentials. Now if this self-evident proposition be applied to jurisprudence, we shall find that much of the current depreciation of International Law is deprived of the grounds on which it rests. It may be perfectly true that the rules which civilized states observe in their mutual intercourse are not sanctioned in the same way as the rules of ordinary municipal law. They may even be far less clear and definite in their commands than are the positive laws of each separate state. We shall find, I think, that their indefiniteness is as much exaggerated as is the clearness of the law of the land. The English Statute Book is not a marvel of precision of statement and scientific accuracy of arrangement. Learned judges have differed materially in their interpretations of our Municipal Law, just as publicists have differed on knotty points of International Law. We have had a conspicuous example lately in the divergent views taken by two great authorities on the subject of the Law of Blasphemy¹. But granting for the sake of argument the truth and justice of all that is said against International Law, we are as

¹ In the *Fortnightly Review* for March 1884, Mr Justice Stephen criticised the lenient view of the Law of Blasphemy taken by Lord Chief Justice Coleridge in the recent case of *Reg. v. Foote and Ramsey*, and asserted that to write, sell, or lend to a friend any attack on Christianity, however measured and decent, is an offence punishable by fine and imprisonment.

free as before to point out that it may perform functions no less useful than those of municipal law, even though it wants the definiteness and coercive force which are supposed to be the exclusive characteristics of the latter. The arguments on the other side, in so far as they are directed to lessen the estimation in which it is held, and not to determine its proper place in the classifications of Jurisprudence, involve the exceedingly doubtful propositions that the stern commands of positive law are the most valuable of all the rules of human conduct, and that those which differ from them in essentials differ only for the worse.

II. Secondly, it is needful to point out that our notion of law is a development. This is a fact which once fairly grasped would save us from many historical and philosophical errors. The Austinian analysis of law into command, obligation and sanction applies with fair accuracy to the condition of some societies under strong and civilized governments; but it fails altogether if we attempt to bring under it the legal phenomena of earlier stages of human progress. The most advanced societies have gone through an epoch of customary law, and large portions of mankind are still under its sway. Austin tells us that laws are the commands of a superior, who prescribes a course of conduct to those on whom he can bring evil in case of disobedience. But how is it possible to apply this account to a state of things where custom is held to have an independent obligatory force, and where no one ever dreams of discussing the reasons for obeying it? It is part of the order into which man is born, in the midst of which he lives, and in which he expects to die. It exists, it always has existed, it always will exist, and man only exists as subject

to it. The question why the decisions of its interpreters should be observed never arises. But if perchance, as solvent influences begin to make themselves felt, some one, more thoughtful or more sceptical than his fellows ventures to inquire, the reply is not, "Because the sovereign has commanded it, and will punish disobedience;" but, "Because the anger of heaven will fall upon the impious wretch who dares to disturb the time-honoured Order of the Universe." Law has grown, like everything else on earth, and there is no reason to suppose that its period of development is ended. Bentham and Austin do not appear to have had the slightest suspicion that the legal phenomena they subjected to their acute analysis had not remained the same from the beginning of time, and would not endure to the end of all things. It would be unfair to blame them; for they lived before ideas derived from Darwin had revolutionized the whole course of scientific investigation, even in regions seemingly most remote from the subjects touched upon directly by the great naturalist. But we, who come after him, ought to be able to assimilate ideas of development, and to apply them to the investigation of the rules of conduct observed by man in society. If we do this, we see at once that the Austinian analysis can be true of one stage only in the growth of law, and that it will not apply to what comes before and what goes after that stage. It is not a body of fixed, irrefragable truth. It is temporarily and provisionally accurate: but there was a time when we in England exhibited legal phenomena which it is impossible to bring under it; and there are not wanting signs that it is already beginning to be inapplicable to our present condition.

III. Lastly, we may remark that the current account

of the nature and essence of law is not only provisional, but also incomplete. If the assumption of Bentham and Austin, that men's ideas concerning the rules of conduct they observe have always been the same, were as true as we have seen it to be false, their analysis would nevertheless be open to the charge of incompleteness. In fact it is, as Sir Henry Maine has pointed out of the same authors' definition of sovereignty, the result of abstraction¹. Attention is withdrawn from all but one of the elements which make up the complex idea of law, and is fixed upon that one alone. Sometimes when we speak and think of law, the notion most prominent in our minds is that of emanation from superior force. We argue, for instance, against the adoption of a given legislative proposal on the ground that it would be impossible for the state to compel obedience to it. Sometimes the idea of regulation of conduct is uppermost. We conceive of law as that which restrains violent and spasmodic action, which enforces order, and directs human activity towards a given end by methodical means. Generally speaking, it is implied that the ends and means should be such as a good man might approve. The idea of moral rightness is usually present, and sometimes it comes prominently forward, as when we speak of wicked conduct as lawless, even though it may be done in obedience to the command of a superior. But occasionally the moral part of the conception seems completely swallowed up by the idea of uniformity. Probably that idea is never altogether absent from our legal notions; but sometimes it fills the mind entirely to the exclusion of all others. This is so avowedly in physical science. Its laws are but the ex-

¹ *Early Institutions*, Lect. XII.

pressions of observed uniformities in nature. But I think we shall find that something of the same kind happens, though perhaps on rare occasions, when we apply the idea of law to the phenomena of human conduct. Uniformity, even if it be uniformity in evil, and the result of no external compulsion, might conceivably be dignified by the name of law. For instance, I once knew a man who worked hard all the week, and got tipsy regularly every Saturday evening. To intoxicate himself at that particular time was a guiding principle of his life. I do not think it would be considered a misuse of language to say that there was a law running through his conduct in this connexion. Lastly, we find in our idea of law the notion that it must proceed from proper authority. We should describe a district which was completely under the control of brigands as in a lawless condition, meaning thereby, not that conduct was necessarily irregular and chaotic there, but that the commands of the constituted authorities of the state were not obeyed. There might be the most abject and habitual deference to the wishes of the robber chief, owing to fear of the punishments inflicted by his bands; but yet we should say that the rule of law was at an end in that territory.

We see, therefore, that ideas of force, order, righteousness, uniformity and authority are all blended together in the complex conception of law. By this statement it is not meant that each idea has, as it were, its own little compartment, where it rests neatly partitioned off from its fellows; but rather that all exist together, and that the conditions of thought call sometimes one and sometimes another into prominence, the rest remaining for a time in obscurity. It is also deemed that the notions of order and uniformity are not the same. By order is meant the

opposite of chaos and anarchy, that which is regular and methodical; whereas uniformity involves the idea of frequent recurrence. The conduct of a gardener, for example, who to-day sows peas, to-morrow tends cucumbers, and the next day spends his time in watering, is quite orderly, though it has in it little of uniformity. Order does, no doubt, result very frequently in uniformity; and thus the two things are intimately connected; but nevertheless they are not identical.

Now of all these ideas Austin gives prominence to one only, that of force. According to him, a law is a general precept which you can be compelled to observe: he who can bring evil upon you can set you a law: you are under a law when you are impelled by fear of evil to obey another's commands.

We need not quarrel with this account, if it is clearly understood to be incomplete. But if it is to be put forth as the truth, the whole truth, and nothing but the truth, we must be permitted to register an emphatic protest against it. The current idea of law contains so many elements that no definition could embrace them all. Any attempt at their inclusion would lead to inextricable confusion. The Science of Jurisprudence must be based upon something clear and definite. It is needful therefore to take a portion only of the conception of law, and to treat it for purposes of definition and classification as if it were the whole, just as, in order to construct a scientific theory of exchanges, Economists have to assume that no motives sway men in the matter of buying and selling, beyond the desire to get the best goods at the lowest prices on the one hand, and on the other to obtain the highest prices for the goods they have to offer. In societies based upon competition these

are, no doubt, the chief springs of human action in business affairs, but they are by no means the only ones. They are, however, treated as such for the purposes of Political Economy, because it would be impossible to deal with values scientifically, if any attempt was made to calculate and allow for beforehand the varying force of habit, love of ease, desire to benefit a neighbour, and all the other countless causes which modify in practice the operation of the main motive in trading transactions. The best Economists recognize this fully, and declare with emphasis that the conclusions of their science are only approximately true in the realm of everyday life. They represent tendencies, rather than accomplished facts. The value of most things *tends* to equal the expenses of their production; profits on equal capitals *tend* to an equality; wages in a given occupation *tend* to be such as will maintain the Standard of Comfort usual in that occupation¹. In the same way the jurist should recognize that in constructing a definition of law he must be content to take a few of the most prominent features in a very complex notion, and should admit that the classifications based upon his definition cannot represent with absolute accuracy the ordinary ideas of mankind.

In the case of Political Economy there is one motive, so far superior in power to all others which operate in matters of trade, that there can be no question as to the propriety of its isolation for purposes of scientific calculation, directly the principle is admitted that such a process of abstraction is legitimate. If one spring of action is to be singled out from the rest in order to be

¹ Sir Henry Maine suggests this parallel between Jurisprudence and Political Economy in his *Early Institutions*, Lect. XIII.

made the foundation of an economic theory, there can be no doubt that the desire of gain must be the one. But in Jurisprudence, when we come to define law, there is no such predominating principle, standing clearly out above all the rest, and vastly exceeding them all in importance. As we have seen, there are no less than five ideas involved in our ordinary conception of law. Which of them are we to choose as the basis of a definition? To this question no unhesitating answer is possible, such as is given at once without the smallest doubt when a similar question is asked as to the basis of a theory of exchanges. We may, I think, begin by excluding the ideas of righteousness and authority. They are generally present when we think of law; but they are far less prominent than others. They seldom come to the front, whereas the notions of force, order and uniformity are frequently conspicuous. Of these three we may reject one, that of uniformity, since our inquiries are limited to the actions of men in society. It is the most prominent of any when we apply the conception of law to the phenomena of the material universe; but with reference to the moral and spiritual world it sinks into comparative insignificance, except in so far as it is involved in the idea of order. There remain the two ideas of force and order, and it is extremely difficult to say which of them is the more prominent, and the more important. We think of a law as something imperative, as a command set by a superior power, as a fiat which cannot be disregarded with impunity. But we also think of it as that which restrains irregular impulses, and introduces order into the actions and passions of mankind. Shall we in our definition lay stress upon the force which compels submission, or the

order which is the result of obedience? Is law to be for us that which superiors command, or that which regulates conduct?

The best exponent of the first of these alternatives is Austin, of the second Hooker. The Benthamite jurist defines law in its widest sense as "A rule laid down for the guidance of an intelligent being by an intelligent being having power over him¹." The Elizabethan divine starts from the Aristotelian notion of the end or purpose of action, and gradually develops his notion of law in the words, "All things that are have some operation not violent or casual. Neither doth anything ever begin to exercise the same, without some preconceived end for which it worketh. And the end it worketh for is not obtained unless the work be also fit to obtain it by. For unto every end every operation will not serve. That which doth assign unto each thing the kind, that which doth moderate the force and power, that which doth appoint the form and measure, of working, the same we term a law. So that no certain end could ever be attained, unless the actions whereby it is attained were regular, that is to say, made suitable, fit and correspondent unto their end, by some canon, rule or law²." Austin invariably writes as if his definition was the only one that had the slightest pretence to accuracy, and the classification founded upon it the sole scientific division of laws into their various kinds. With all his acuteness, he laboured under the same defect as his master, Bentham. He could never do justice to, or even understand, views that differed from his own. Hooker shows a far more Catholic spirit when he writes of those who were

¹ Austin, *Jurisprudence*, Lect. I.

² Hooker, *Ecclesiastical Polity*, I. II. 1.

Austinians two centuries before Austin: "They who thus are accustomed to speak apply the name of law unto that only rule of working which superior authority imposeth; whereas we, somewhat more enlarging the sense thereof, term every kind of rule or canon, whereby actions are framed, a law¹."

It seems, then, that in seeking after a definition of law we have not only to withdraw our minds from all the elements but one of a complex conception, but also to choose between the two ideas which seem equally prominent in that conception. Our definition, in order to be scientific as a definition, must be incomplete as a description. We must build upon the notion of order, or the notion of force. The question is, which of the two ideas is the more important, which is the key to the greatest number of distinctions between various kinds of rules, which can be made the basis of the classification most convenient for the purposes of everyday life, and most fruitful of results in the field of juristical research.

To answer these questions fully would be to re-write the science of jurisprudence. Current opinion, influenced almost exclusively by Bentham and Austin, pronounces with a near approach to unanimity in favour of the first of these alternatives. It would perhaps allow that law is a growth, and that the great analytical jurists dealt with the phenomena of one stage only in its development. It might also concede that their account of law was not complete, but was, as we have contended, the result of abstraction. But it would hardly be prepared to admit that there was anything to be said for Hooker's view as against Austin's. Yet it seems to me, if I may venture

¹ Hooker, *Ecclesiastical Polity* I. III. I.

to say so, that Austin's account of law was not only limited and imperfect, but that it was not even true as far as it went in his time, and is now becoming less and less true every day. It regards law as the product of superior force, intelligence being predicated of those who set it, and those to whom it is set. Now this, no doubt, would be perfectly true of a state of society where the law of the land was obeyed simply and solely through fear of the punishments enforced by the law-giver. It was perfectly true, for instance, of England under the Normans and the early Plantagenets, when the king was the great policeman, and the "King's Peace" a most inestimable reality, instead of an unmeaning formula. The interval between the death of one king and the formal election and coronation of another was generally given up to wild orgies of crime. Every man did what was right in his own eyes, because there was no superior authority to make the law respected. The abeyance of power was also the abeyance of law. And, even when the king was fully established on his throne, he had often to strike hard at some powerful baron, in order to compel him to submit to any restraints upon his own arbitrary will. The story of the fall of Falkes de Breauté, sheriff of Cambridgeshire and the neighbouring counties in the early part of the reign of Henry III., illustrates our point exactly. He was the personification of utter lawlessness. At Dunstable in June, 1224, he was convicted of no less than thirty-five acts of disseisin. For a long time he worked his will with impunity; but at last his brother William arrested and imprisoned in the castle of Bedford the itinerant justices who were inquiring into his misdoings. This outrage brought about the ruin of both of them; for

Hubert de Burgh, the great Justiciar, levied the forces of the neighbouring counties, besieged the castle, and took it in August, 1224¹. The garrison was hanged, and Falkes de Breauté driven into exile. The history of the period is full of similar events. The highest praise given to great rulers like Henry I., Henry II. and Edward I. is that they "kept good peace." The king stood between the nation and anarchy. The laws made by him with the counsel and consent of the magnates were obeyed because he could enforce them. A strong-fisted ruler was the greatest of blessings to the land. It was far more important then to arm the executive with irresistible force, than to guard against its encroachments. Even such a tyrant as John was not resisted because of the excess of power he had gained for himself, but because of the foul uses to which he put the power he had. In his hands the authority to which men looked to control the anarchical elements of society made itself their agent, and thus provoked universal rebellion. The discipline of strong rule had to curb the lawless passions of nobles and people, before they could be trusted to govern themselves. Having learned obedience by the things which they suffered, they were capable of giving effect to self-imposed rules. The jurist as well as the moralist has need to preach that

"Self-reverence, self-knowledge, self-control,
 These three alone lead life to sovereign power.
 Yet not for power, (power of herself
 Would come uncalled for) but to live by law,
 Acting the law we live by without fear;
 And, because right is right, to follow right
 Were wisdom in the scorn of consequence²."

¹ Stubbs, *Constitutional History*, II. 35.

² Tennyson, *Ænone*.

This is not Austinian doctrine; but I believe it is good jurisprudence nevertheless. Force is the main support of law in lawless times. But in proportion as it does its proper work of crushing out anarchical impulses, and disciplining society, it ceases to be the main element in producing obedience. Law no longer emanates from the mere will of the rulers, but from the wisdom of the community. Its chief support is not the force controlled by government, but the general sense of its goodness and utility. Force is still there, to be used in the last resort, but it is seldom needed. The chief reason why an average Englishman obeys law to-day is because he thinks it good and just, and because he has got into law-abiding habits. The life of the English nation has been slowly led to sovereign power by the steady growth of self-knowledge, self-reverence, and self-control among all classes of the English people; and thus they have come to act the law they live by without fear, and to follow the right therein embodied because it is right, and not because of the consequences that might overtake them if they disobeyed. The tendency in this direction, which seems to me to be universal in progressive societies, is undoubtedly most marked in self-governing communities. When the hitherto neglected subject of the effect of forms of government on legal conceptions comes to be carefully studied by competent thinkers it will, I imagine, be found that democracy engenders views of law quite irreconcilable with those put forward by Austin.

Sir Henry Maine has shown that, before the existence of strong and highly centralized governments, the theories of the great analytical jurists would have been impossible¹.

¹ *Early Institutions*, ch. xiii.

I think we may go further, and say that every change which makes such governments more popular in their form; makes these theories less applicable to existing conditions. In a democracy there is no sharp distinction between rulers and ruled. The governed in the last resort control the making of the laws, and dictate the use of the force at the disposal of the executive. In fact, they themselves supply that force, and without their goodwill it fades away. Any attempt to compel obedience to a law disapproved of by the people at large becomes increasingly difficult. On the other hand, law deals with countless matters which it did not attempt to touch in previous stages of its development. Here in England, for instance, within the memory of men not yet old, the two vast subjects of education and health have been annexed to its domain. If every child had to be dragged to school by a policeman, while its parents were kept from recovering it by the point of a soldier's bayonet, our system of popular education would suffer ignominious collapse. If all our countless sanitary regulations, all our factory laws, all our rules to provide for the safety of miners and sailors, needed to be enforced by the executive authorities, one half of the population would be employed in watching and coercing the other half. It is just because coercion is no longer required in most cases that we are able to have laws at all on these subjects; and coercion is no longer required because the law is the product of the stored-up wisdom of the community, rather than the expression of the will of its rulers.

Now if force is rapidly ceasing to be the most important element in law, surely it is time we began to revise a definition and classification of law based entirely on the

idea of force. It was once applicable, no doubt, to the legal phenomena exhibited by societies of the progressive Western type, while they were passing through the stage of strong repressive government. It is now applicable with unqualified exactness to the legislation of such a country as India, where the Governor General in Council makes laws for the whole of the vast populations under the direct rule of the British Crown, and enforces them by the agency of a highly organised bureaucracy, backed up in the last resort by a numerous army, a large proportion of which are British, not Indian troops. But it is no longer applicable to the laws of England, or to those of any country where the wishes of the great body of the people find constitutional expression in the enactments of the legislature. In the main, the laws are what the popular voice demands that they shall be, and obedience is rendered to them because they are felt to be self-imposed, and deemed to be right. If a man breaks any of them, his neighbours render every assistance to the executive officers. Sometimes they themselves take the initiative in bringing him to justice. The force at the back of the laws is not so much the force controlled by the government, as a force which is purely voluntary in its action, and which depends for its successful operation upon the power of public opinion. The brute force at the disposal of the executive is kept in reserve to win the battle of order in the few instances when the other portion of the army is insufficient for victory. The law is as a rule obeyed in all stable societies, whatever their form of government; but the general current of thought with regard to it must run in different channels according as the sovereign power of the state is in few or many hands. In the first case it will be regarded as dependent upon the

will of the rulers, in the second case as dependent upon the wisdom of the people.

We have already seen that there is a stage of social development anterior to that of highly organized and centralized governments, the stage, namely, of custom and customary law. We now see that there is another stage, arising out of the former, as it arose out of the latter. The Roman Empire was the great instrument in working the first change¹. As its dominion spread the force at the back of law became purely coercive, and the order which results from law became impersonal and general. Accordingly in all societies which have come under its influence, that is to say, in all progressive Western communities, it is considered to be the function of the sovereign² to legislate, and the laws thus produced are held to be general in their application, and to rest for their ultimate support upon the force which the rulers control. The second change is, I hold, in course of being accomplished by the force of modern democratic ideas. As governments become more and more popular, their functions are rather increased than diminished. Legislation is more active than before, order is more general and complete, but the notion of force, as an essential element in law, tends slowly and gradually to disappear. If a man living under customary law were asked why he obeyed its rules, he would answer, provided that he was able to comprehend the meaning of the question, "Because they have been obeyed from time immemorial, and the gods will surely avenge any breach of them." If a man living in a mediæval European kingdom had been asked why he

¹ Sir Henry Maine, *Early Institutions*, Lect. XIII.

² I use the word in its technical sense to signify the actual ruling power in a state, whether it be a single individual or a body of individuals,

obeyed the law, he would have answered, "Because the king will see that I am punished if I do not." If we were to ask to-day an intelligent Swiss or American why he obeyed the law, he would probably answer, "Because I helped to make it, and think it in the main just and good. And in the few instances in which I do not approve of it, I obey because society could not get on without order, and it is therefore necessary that each should sacrifice some of his own private likes and dislikes to the good of the community." In the first case superstition and instinct cause the law to be obeyed, in the second case force, and in the third case opinion.

We must, of course, bear in mind that a large portion of the human race is still living under the *régime* of customary law, and that, of the states which have advanced out of it into the second stage, comparatively few possess free and popular institutions. But in all these last it seems to me that the organized opinion of the whole community is slowly taking the place of organized force as the motive power which brings about obedience to law. If this be so, the Austinian analysis will no more apply without qualification to the legal phenomena of these societies than it does to those of the epoch of custom. It is seen to be true of but one stage in the development of law, the middle period, when the commands of a sovereign are obeyed because he has power to enforce obedience by coercive measures. It is not absolutely true of modern England. It is better suited to the kingdom of William the Conqueror than to the kingdom of Victoria. I do not assert that there is no element of force in our legal notions to-day, but I deny that it is the chief element. It is there; but it is getting day by day further and further into the background, and

therefore less and less fit to be made the pivot of a definition. In an ideal state of society it would be entirely absent. No one would need to be coerced into respect for his neighbour's person or property. Everyone would obey of his own accord all state regulations, which would be invariably just and wise. There would be no judges, no police, no prisons; yet perfect order would reign, and perfect justice be done between man and man. Would the triumph of law make the community lawless? The very mention of such a proposition raises a smile. Yet if Austin's theory is absolutely true of all places and all circumstances, a society such as I have supposed would be entirely without law. We want a definition of law which fairly sets forth our own legal conceptions, and is likely to set forth the conceptions of the generations which succeed us; and in order to get it, we must, I think, assign a less important place to the idea of force, and turn our attention more seriously towards that of order.

I do not propose to work out in detail the suggestion I have just made. Hooker and Blackstone have attempted something of the kind, but neither of them has been very successful. Blackstone failed from absolute incapacity for speculative inquiries. No great writer was ever more conspicuously wanting in the critical and analytical faculties. Hooker failed, partly because his object was theological and ecclesiastical, and partly because in his day inquiry into social phenomena had not become analytical and introspective. He was a little older than his great contemporary, Bacon, and the first four books of his *Ecclesiastical Polity* were published nearly thirty years before the *Novum Organon*. He thus escaped the influence of the new inductive philo-

sophy, which so powerfully moulded the thought of the seventeenth century, and whose methods were applied by Hobbes to the problems of morals and jurisprudence. But though the classification of laws attempted by Hooker is unscientific in its arrangements, and redundant in some quarters while it is incomplete in others, yet I think we should do well to adopt his short definition of Law, as "Any kind of rule or canon whereby actions are framed¹." We might then proceed to divide Law into its kinds, by separating from one another the various authors of rules of conduct observed among men, and in doing so we should find the Austinian analysis an exceedingly valuable aid. Confining ourselves to human laws, we should observe that some are set by state authority, and these we might call Municipal Law. Next we should deal with rules set by international opinion, and then with rules set by general opinion. The former we should, of course, call International Law; and the latter we might term, for want of a better phrase, Moral Law, meaning thereby not a series of propositions as to what ought to be done, which is the proper subject-matter of Ethics, but a collection of precepts actually observed among men, though set by no other earthly authority than the general opinion of the society in which they are current, or the consciences of those who obey them. They would be laws in the sense which we have given to the word; but our only reason for observing them would be either that we held them to be right, or that we did not care to face the disapproval of our neighbours. They are not armed with clearly defined punishments to be inflicted by clearly defined

¹ *Ecclesiastical Polity*, I. III. I.

persons on those who presume to disobey. International Law is, however, provided with such sanctions as regards some of its rules, while others depend for their coercive force on nothing but the general opinion of rulers and peoples, and the probability that nations which disobey them will suffer some undefined evil from some state or states not capable of being pointed out beforehand.

Here we have the rough outlines of a definition and classification of Law more in accordance with the facts of modern life in progressive Western societies than is the definition and classification of Austin. In our definition we substitute the notion of order for that of force; and having by this means included among human laws many rules of conduct which Austin excludes, we divide them into classes according to the nature of the authority from which they proceed, arranging them in the order of the strength of their sanctions. The sanction, which is the all-important element in the current theories of law, is relegated in ours to a subordinate position, the great question with us being not, Who can enforce a given precept? but, Does it regulate human conduct? Etymology, as well as convenience, is in favour of the change; for there can be no doubt that the root-meaning of the English word *law* is, that which lies in due order¹, just as the Latin *jus*, in its sense of law, signifies "what is fitting, orderly and regular²."

An innovation such as we have just proposed, is not likely to pass without criticism; and it may lead to a clearer appreciation of the real points at issue, if we restate with a view to possible objections, the conclusions

¹ Skeat, *Etymological Dictionary*, Art. Law.

² Clark, *Practical Jurisprudence*, p. 21.

at which we have arrived. In the first place, we do not maintain the manifestly absurd proposition that Municipal Law and International Law are the same in all essentials, such points of difference as the existence of definite sanctions and regular courts in the former and their absence in the latter being trivial and unimportant. Nor again do we affirm that there is any superhuman virtue in states, whereby they are enabled to act up to what is right in all cases, without the machinery of coercion, which governments find so exceedingly useful in restraining the evil passions of the unruly among their subjects. On the contrary, we expressly declare in the Sixth of these Essays, that the international society formed of civilized states, is retarded in its development by the lack of authoritative tribunals. The question is not whether the system we call International Law is similar in all respects to Municipal Law but whether it is properly termed Law at all. It is quite true that all the special pleading in the world will not convince a man who has just dined off three courses, that he has eaten six. But if that patent fact is made an excuse for telling him that he has not dined at all, he will probably consider his interlocutor's ideas of a dinner too magnificent for ordinary mortals. Now, just as the true definition of Dinner may be wide enough to cover a meal of three courses and a meal of six, so the true definition of Law may be wide enough to include International Law as well as Municipal Law. But neither the affirmative nor the negative of this proposition is proved by shewing conclusively that International Law lacks certain qualities which Municipal Law possesses. Those who challenge the right of the former to the name it bears, must

shew that the missing attributes are marks of the *genus* Law; and not of the *species* Municipal Law.

Undoubtedly this can be done if we are content to accept without demur the Austinian definition of Law in its widest sense as "A rule laid down for the guidance of an intelligent being, by an intelligent being having power over him." Such a definition at once excludes the greater part of International Law, because most of its rules are set to states by the general opinion of their number, and though it is exceedingly probable that habitual disobedience to them will be followed by unpleasant consequences, we cannot say beforehand what the penalty will be, or who will inflict it. But we have endeavoured to show in the preceding pages that, as man progresses, the notion of force as the most necessary element in the conception of law, tends to fall into the background; and that just as children, when they grow into men and women, see for themselves the value of rules which were previously obeyed chiefly because they were set by the external authority of parents and teachers, so states in their development towards moral and intellectual manhood, need less and less the discipline of compulsion, and come in an ever increasing degree to obey their laws because they believe them to be just and useful. The process is an exceedingly gradual one; but it requires as the condition of its existence, nothing more than a general diffusion of that knowledge and self-restraint which the Austinian theory tacitly assumes to exist already in those who set the laws. Austin takes for granted that the sovereign body in the state, the great "uncommanded commander," will on the whole see what rules of conduct are righteous and beneficial, and, with possibly a few casual aberrations,

prescribe them and no others. But it is not compelled to do so; for there is no human authority above it to control its actions. If then, as we should all admit, most of its commands are just, they must be so because it, or those to whom it defers, can discern and act upon beneficial principles of human conduct. Now if the rulers of a nation can do this, why not in time the whole nation? And when the whole nation does it, what has become of force as a necessary element in its law? No one supposes that the universal diffusion of just principles and the power to act upon them is likely to be attained for generations. But history shows that it is already pretty general among the peoples who are foremost in civilization, and that the law of the land is obeyed by them, especially if they are self-governing communities, far more because it is deemed just and right than because punishment will follow if it be broken.

On these grounds we have thought fit to make our definition of Law in its widest sense hinge, not on the idea of force, but on that of order, which we believe to be the most prominent and universal characteristic of those precepts which are usually termed laws. We therefore define Law as, A rule of conduct actually observed among men. We thus point to order and regulation instead of imposition by superior force, as the mark of the *genus*; but when we come to differentiate the *species* of which the *genus* is composed, we find it necessary to refer among other things to considerations based upon force, in order to give an account of the marks whereby the different kinds of laws may be distinguished from one another. These kinds are in our view Municipal Law, International Law, and Moral Law. The first is set to subjects by the supreme authority in the state,

and it possesses a perfect sanction, that is to say a definite evil is denounced against those who break it. The second is set to states, and in a lesser degree to individuals also, by the general opinion of civilized nations; and some of its rules have perfect sanctions, while as regards others the sanctions are imperfect, that is to say, though evil is likely to follow from disobedience to them, we cannot tell beforehand what it will be or who will inflict it. The third is set to individuals by the general opinion of the society in which they live, and possess only imperfect sanctions. We do not deny, but on the contrary we expressly affirm, that force has important functions to perform in securing obedience to Municipal Law. For ages to come it will be necessary; but since in progressive communities the need of it grows even less and less, we decline to say with Austin that it is the essential element in juridical conceptions, and that a rule of conduct which cannot be enforced sooner or later by external compulsion is improperly termed a law.

We are now in a position to apply the foregoing considerations to Mr Justice Stephen's criticisms of International Law. He has no very high opinion of it as a system, but his quarrel is far more with the name than with the thing. The expression *International Law* is, he argues, inexact, ambiguous and misleading, because it is applied to a variety of rules and principles, some of which are not *law*, while the remainder are not *international*. "When it is applied to principles and rules prevailing between independent nations, the word 'law' conveys a false idea, because the principles and rules referred to are not and cannot be enforced by any common superior upon the nations to the conduct to which they apply. When

it is applied to parts of the law of each nation in which other nations are interested, the word 'law' is correct, but the word 'international' is likely to mislead, because though such laws are laws in the fullest sense of the word and are enforced as such, they are the laws of each individual nation, and are not laws between nation and nation¹." The stipulations of treaties are given as an instance of the first class of rules, and the law that ships may be confiscated for breach of blockade as an example of the second.

Now it seems to me that the first of these illustrations is rather unhappily chosen. There is great difference of opinion among writers on International Law as to whether treaties are properly speaking part of that law. The common English view is that most treaties merely register a bargain between the contracting parties, each surrendering something to the other, in order to gain from the other something else he deems more important. On the other hand, a school of Continental publicists exalt treaties into a corpus of International Law, ascribing to them, or rather to a number of them arbitrarily selected because they set forth special views, a transcendental and altogether fictitious importance. Sir J. F. Stephen has overlooked this divergence; and in consequence he has represented as undoubted International Law the disputed views of a number of writers, of whom Hautefeuille may be regarded as the chief. The point is perhaps a small one, and I should not have mentioned it had it stood alone. It is, however, an example of a tendency which is visible all through the remarks of the learned judge. On almost every page he refers either in express

¹ *History of the Criminal Law*, II. pp. 34 and 35.

words or by implication to the *a priori* and theoretical character which he ascribes to International Law. He says of its exponents, "their theories all rest at last neither upon common usage nor upon any positive institution, but upon some theory as to justice or general convenience, which is copied by one writer from another with such variations or adaptations as happen to strike his fancy. Moreover the history of these theories shews how uncertain and variable they are¹." Now this is a perfectly just description of the method of what for want of a better designation we must call the Continental school of publicists, but it is by no means exact if applied to the works of most English and American writers, and still less is it true of the judgments pronounced by the Prize Courts of Great Britain and the United States. These noble monuments of learning and acuteness are reared upon the solid foundation of experience and observation. Their authors refer constantly to precedent; they institute laborious inquiries into the customs of civilized nations; they investigate history with unsparing industry; they hold with the greatest of their number, Sir William Scott, that the law of nations is "fixed and evidenced by general and ancient and admitted practice, by treaties, and by the general tenour of the laws and ordinances, and the formal transactions of civilized states²." Modern English text writers do sometimes at the commencement of their books lay down a number of high-sounding propositions about eternal justice, and "the nature of the society existing among independent nations," but they have the happy knack of forgetting all about their theories when they come to details. They invariably work out

¹ *History of the Criminal Law*, II. p. 38.

² *The Le Louis*, II. Dods. p. 249.

their systems by a constant reference to historical facts. Let any candid person read the works of Wheaton, Manning or Hall, and he will pronounce that the method of these writers is mainly inductive¹. The question of the proper relation of Ethics to International Law is too large and complicated to be discussed here. I trust, however, that I have said enough to show that all the authorities on our subject cannot justly be regarded as unpractical dreamers, weaving out of their own brains a web of theory, which they falsely assert to be a system of law. I am not concerned to deny that much confused thought and bad philosophy may be found in the earlier chapters of most English publicists, just as much false history may be found in the works of most English lawyers. But the main mass in each case is sound. The lawyers give the law as it stands with perfect accuracy, and the publicists set forth the rules actually observed by nations in their mutual intercourse.

We have seen reason to regard as unsuitable the example given by Sir J. F. Stephen of the first of the two classes into which he divides the usages observed by civilized states in their dealings with one another. The division itself, however, is apt and just. There can be no doubt that under the term *International Law* we include rules which have as perfect a sanction as ordinary municipal laws, and rules which are enforced by nothing but the fear of general disapprobation, and the probability that some among the many states whose feelings would be outraged by the breach of them will inflict some evil upon the power which ventures to set them at naught. If we substitute for the illustration we have rejected some

¹ Hall, at the commencement of his *International Law*, disclaims the *a priori* method, and avowedly bases his system upon usage.

well-known precept of the laws of warfare on land, such for instance as the rule that private property shall be exempt from pillage, we shall see at once that we cannot predicate of it the same kind of sanction as is possessed by the other rule mentioned by the learned judge. If an invading army resorted to indiscriminate plundering and destruction in the districts under its power, there would be a great outcry and many protests, and that is all. A long-continued course of such conduct might bring down upon the offender armed interference from other states; but there are no rules of International Law which apportion the time and measure of punishment, or appoint any powers to be its instruments. But in the case of a breach of blockade, a tribunal to administer the law, and an agent to inflict the punishment, are provided beforehand. The blockaders may capture the delinquent vessel, and a Prize Court of their country decides upon its fate. It is clear, then, that there is a marked difference between the two cases, and therefore between the classes of rules of which they are fair samples. We admit the justice of the separation between them. Can we follow its author still further, and hold with him that the first kind are not *laws* at all, while the second kind are not *international laws*?

The answer I give to this question is an unhesitating negative. Let us consider first the case of those rules of international conduct to which only what is called an imperfect sanction is annexed. Sir J. F. Stephen holds that they are not laws. "As between nation and nation," he says, "there are no laws properly so called, though there are certain established usages of which the evidence is to be found in the writings of persons who give the history of the relations which have prevailed between nation and

nation¹." It is evident that the correctness of this statement depends entirely upon the meaning attached to the term *law*. If the account given by Austin is absolutely true, the name can be applied to no other rules than those which are set by a determinate author, and armed with a definite sanction. It is impossible to maintain that the rules we are considering come within this category. Therefore on Austin's principles they are not laws. But we have already seen that there are good reasons for setting aside the definition of law given by the great analytical jurist. It is necessarily incomplete; it is strictly applicable only to that stage of social development in which nations are compelled by strong rulers to observe commands imposed upon them by the latter; and it is no longer suited to the conditions exhibited by the most progressive states, in which physical force plays a less important part every day, and the laws, being self-imposed, are obeyed in most cases because they emanate from the collective wisdom of the community. We, therefore, substituted the idea of order for that of force in the definition to which we were finally led, and came at last to regard as laws all precepts which do actually regulate human conduct, no matter from what authority they proceed, or with what sort of sanction they are supplied. To those who accept this view the usages which regulate the conduct of civilized states towards one another are really laws, even when no definite punishment is annexed to the breach of them. Everything depends upon the definition of law which we choose to adopt. The controversy is really a logomachy—a dispute about words, not things. Unless we can persuade ourselves that the last word on

¹ *History of the Criminal Law*, II. p. 41.

legal philosophy was spoken by Austin fifty years ago, we ought to be willing to admit that his classification is not final, and cannot be used as a touchstone to decide the claims of all systems which aspire to bear the majestic name of law.

We have next to deal with those usages of which a fair specimen is to be found in the rule that a belligerent may seize and condemn any ship which attempts to break his blockade. "In this case," says Mr Justice Stephen, "there is no doubt a proceeding which in the very strictest sense of the word is legal, but if the matter is carefully considered it will, I think, appear that the law enforced is not a law common to all nations, but the law of the nation which seizes the ship. Each nation in this matter legislates concurrently for all mankind, and as upon the whole this is regarded as convenient for all mankind, no one nation objects¹." Acute and ingenious as this theory is, I doubt whether it will stand the test of examination. The learned author of it denies that such a law as that of blockade or contraband is imposed by the consent of nations. Consent "is merely a circumstance which enables it to be imposed by individual nations²." But surely a rule cannot occupy the position accorded to the laws of maritime capture, without something more being required than its imposition by each individual nation. The effect of the passing of an identical criminal law by the legislatures of all states would be to make the same act a crime for the citizens of all of them. It would not give the tribunals of one any wider jurisdiction over the subjects of the others than they possess at present. The slave trade, for instance, has

¹ *History of the Criminal Law*, II. p. 35.

² *Ibid.* II. p. 36.

been declared to be Piracy by the laws of all civilized states; but no one state is allowed in the absence of special compact to capture slavers belonging to any of its neighbours. They are offenders, not against International Law, but against the law of their own country. Its vessels must exercise police over them, and its courts try them. Whenever they are subject to capture by the cruisers of other countries, a treaty exists by which the state in question consents in express terms to associate other powers with itself in the exercise of jurisdiction over its subjects engaged in the trade. But with piracy *jure gentium* the case is very different. It is an offence justiciable by any state whose officers can capture the offenders, the reason being that it is a crime by International Law, and not merely by the law of each separate state. In fact, to be accurate with regard to it, we must reverse the argument of Sir J. F. Stephen, and assert that the "law enforced" is "a law common to all nations," and is *not* merely "the law of the nation which seizes the ship¹." The same considerations hold good with regard to the learned judge's own illustration from the law of blockade, and also with regard to most of the rules of maritime capture. They apply in fact to the whole of that class of rules which he admits are properly termed law, but to which he denies the epithet *international*. Undoubtedly they are laws in the strictest Austinian sense, but it seems to me that they are as undoubtedly *international* also. The consent of states with regard to them is something very much wider than a consent to allow each separate state to impose them at its pleasure. It is a consent which makes each state

¹ *History of the Criminal Law*, II. p. 35.

under certain circumstances the minister of a law agreed upon by all states. England, let us say, is a belligerent. By the mere fact of going to war she acquires a right to capture and confiscate contraband goods in the custody of neutral carriers on the high seas, if bound for an enemy destination, and neutral vessels attempting to enter enemy ports which she has placed under an effective blockade. Now, under ordinary circumstances, not only would such forms of trade be perfectly innocent; but also whatever cases might arise with regard to the goods and vessels engaged in them would be justiciable in the courts of the country to which the ships belonged. But the outbreak of war works such a change in the legal position of all concerned, that it subjects to punishment actions on the part of neutrals which before were perfectly legitimate, and it obtrudes an alien jurisdiction into the sphere of the operation of the laws of the neutral country. I cannot believe that this great change is satisfactorily accounted for by saying that the commands "Do not carry contraband," "Do not break blockade," are laws which each nation makes for all mankind¹. Something more than a legislative enactment of such tremendous generality is required, as we have shown in the case of Piracy, before the law of another state can be set aside, and its ordinary jurisdiction ousted. A mere passive consent on the part of civilized nations (for of them alone are we speaking) to allow each one to legislate as it pleases in such matters is not enough. There must be a well-understood, though not necessarily express, agreement that every belligerent state may enforce for its own benefit rules of maritime capture which have

¹ *History of the Criminal Law*, II. p. 36.

been assented to by all states. A right of concurrent legislation exercised in such cases by each state over all mankind would imply a right to make such laws as it pleased, and would not imply a right to enforce them within another's jurisdiction. States, for instance, have a right of concurrent legislation over persons born under circumstances that make their nationality doubtful; and each state is free to adopt what principles it pleases in its laws on this subject. With regard to the children of foreigners, England applies the rule that birth within her territory makes them her subjects. France, on the other hand, holds in all cases to the principle that the nationality of the parents determines that of the child. Thus a son of French parents born in England would be in the view of English law an English subject, and in the view of French law a French subject. Neither state, however, would attempt to force upon him the obligations of the position it accorded him, as long as he remained within the jurisdiction of the other. But in the case of captures at sea in time of war the circumstances are reversed. A belligerent can enforce the rules he acts upon, against those who would under ordinary circumstances come under the jurisdiction of other powers; but he cannot act upon any rule which happens to suit his own fancy or convenience. He must apply rules common to all civilized states, if he wishes neutrals to submit peacefully to the inconvenience they cause. The history of International Law is full, on the one hand, of protests and reclamations made by neutrals when belligerents acted upon principles of maritime capture which were not universally received, and, on the other hand, of quiet acquiescence by neutrals in proceedings most detrimental to their interests, when they were

carried out under rules of acknowledged validity. We may go further, and say that not only must the rules themselves be those which all civilized states accept, but the method of their enforcement also must be the particular method allowed by general usage. A blockading squadron which habitually sunk blockade runners by torpedoes, instead of capturing them and sending them in for adjudication by the courts of its own country, would soon be called sharply to account; and if its government did not make it discontinue the practice, neutral states would certainly decline to recognize the validity of the blockade, and some of them might resort to hostilities for the purpose of removing their grievance. These facts seem to me to point irresistibly to the conclusion that the rules in question are set by the common consent of all civilized states, acting as corporate bodies through their respective governments, and that the same common consent which sets them provides a definite punishment for their breach, and a definite agent to inflict it. Nor do I see that these conclusions are in any way invalidated by the fact insisted upon by Sir J. F. Stephen, that "if Parliament were to pass an act expressly and avowedly opposed to the law of nations, the English courts would administer it in preference to the law of nations, whatever that may be¹." Undoubtedly this is true; and a similar statement might be made with regard to the legislatures and courts of all other countries; but it proves nothing more than the possibility of a conflict between two sets of rules. If a state claims in international matters greater rights than it possesses, its agents must obey its commands; but other

¹ *History of the Criminal Law*, II. p. 36.

states will hold it responsible for the breach of the usages binding upon all, and will find some way of putting pressure upon it until it conforms to them again. The fact that law is in some instances successfully disobeyed does not make it cease to be law either in international or in municipal affairs. We hold, therefore, that the rules we have been considering are *international* rules, and that they are also *laws* according to the strictest Austinian principles, though like all other laws they may sometimes fail to gain observance.

But here we are met by the objection that there can be no legal relations between independent nations, and that the assent of two or more nations cannot constitute a law¹. To this I am constrained to reply, Why not even on the strictest Austinian principles, if there is a definite sanction provided in case of disobedience, and a definite agent to bring it to bear upon offenders? Surely the governments of all civilized states are as determinate a body as the chambers of an ordinary legislature. It is their tacit consent which sets those rules of maritime capture which are undisputed; and they make no remonstrance when the Prize Courts of any one of their number who happens to be at war punish violations of these rules. Now Austin teaches us that commands may be expressed by other means than words, and in speaking of judge-made law he argues elaborately that the sovereign really commands the rules he permits his subordinates to enforce. We have, then, a determinate body, expressing a definite wish by words or other signs. We have also the other Austinian requisite of a true law; for a sanction is provided in the punishment of

¹ *History of the Criminal Law*, p. 41.

capture and confiscation which follows upon non-compliance with the wish. What more can be needed? Each independent state agrees as a member of the family of nations to the rules it enforces as a belligerent. Its position in the matter resembles the position of an English judge who has been raised to the peerage, and who therefore in his capacity as member of the House of Lords has a voice in making the laws which he administers in his capacity as judge. He consents to rules which arm him under certain circumstances with the power to punish those who disobey them. In the same way every civilized nation consents to rules which arm it under certain circumstances with the power to punish those who disobey them. The analogy seems to me to be complete. Just as the consent of states makes the rules in question *international*, so the existence of a determinate author and a definite sanction makes them *laws*, according to the strictest canons of Austinian jurisprudence. We can thus, on Sir J. F. Stephen's own principles vindicate these rules from his strictures. On the principles we have seen reason to prefer, no doubt whatever can arise as to their position. Being rules observed among men, they are *laws*; being set by the consent of nations, they are *international laws*.

If, then, the conclusions to which we have been led are valid, we may claim to have reestablished International Law in a position from which in the opinion of many authorities it had been driven. We have pointed out that its right to the title of law can be denied only by accepting as absolutely and universally true a theory of jurisprudence which was always incomplete, must necessarily be provisional, and is gradually becoming obsolete with regard to most important matters. We have shown

that, even according to this defective theory, a large portion of its rules must be ranked among the most perfect specimens of law. And we have directed attention to the obvious fact, that its utility does not depend upon its place in the classifications of jurists. It is a noble system, by whatever name we agree to call it. Some of the best and wisest of men have devoted their talents to the task of shaping it out of chaos into form and symmetry, and their eloquence to the harder task of persuading the nations to accept its humanizing precepts. Already it has conferred great benefits upon mankind; and on its stricter observance and further development rest some of the fairest hopes for the future of our race.

ESSAY II.

THE SUEZ CANAL IN INTERNATIONAL LAW.

THE Suez Canal has been the subject of a vast amount of literature in almost every European language since M. Ferdinand de Lesseps obtained, in 1854, his first Concession from the Khedive, Said. But though its engineering difficulties and triumphs, its importance to trade, its political effects, its financial position, and its future regulation have been discussed by countless writers; very few have set themselves seriously to consider what is its exact position in International Law. And yet the question whether any of the rules that are generally accepted by nations as binding in their mutual intercourse apply to it, and if so, what they are, what rights they confer, and what duties they impose, is surely one which has an important bearing upon a great many of the controversies with regard to it. It is not difficult to demolish the contention of M. de Lesseps that the canal is already neutralized. This theory rests upon a single phrase in a single article of the Khedive's Concession of 1856; and it involves the doctrine that the government of a country can at its pleasure declare a portion of its territory neutral, and thus of its own proper

motion add to the international obligations of other states. But it may be shown conclusively that a general international agreement would be required in order to confer the status of neutrality upon the canal; and it is certain that no such agreement has been effected up to the present time (August, 1885), though several attempts have been made to obtain one. To do M. de Lesseps justice, it must be admitted that his contention was put forward more as a convenient controversial missile to throw at Great Britain, when in 1882 she seized the canal in spite of his protests, than as a serious doctrine of undoubted validity. But nevertheless, so great is his influence abroad, that it is necessary to demonstrate the falsity of the theory that the canal has been from the beginning a neutral passage, lest we should find it hurled in our teeth by continental writers, whenever we have occasion to make any proposals or take any action incompatible with its acknowledgment. Whatever may be our views with regard to the desirability of neutralizing the canal, we may take for granted that at present it has not been neutralized.

Putting aside then as altogether baseless the views which have been advocated for a special purpose by M. de Lesseps, we find two other theories commanding a certain amount of support. On the one hand it has been argued that the canal is in the same legal position as a narrow natural strait connecting two open seas¹; and on the other hand a great deal of reasoning with regard to it has been based upon the assumption that it is an internal waterway, under the complete control of the local sovereign, except in so far as his rights may

¹ See Article by Professor Holland in the *Fortnightly Review*, July, 1883.

have been granted away by special compact¹. Each of these conclusions rests upon analogical reasoning; and the fact that the same method can in different minds lead to mutually contradictory results raises a strong suspicion that it is not well adapted to the solution of the present problem. I venture to think that both the theories which it is used to support will fail to stand the test of a detailed examination.

The validity of the argument that the Suez Canal is in International Law an arm of the sea depends entirely upon the assumption that we may disregard a number of very important facts connected with it when we come to consider its legal aspects. But can we safely do so? In reasoning from analogy it is necessary to be on our guard against ignoring circumstances that are material to the issue. We might, for instance, establish a very satisfactory connexion between mankind and birds, on the ground that both are bipeds, if we left out of consideration the fact that men are featherless. But seeing that nature has not endowed them with the means of flying, the analogy breaks down completely. In the same way we shall find that analogical reasoning gives us little help in dealing with the Suez Canal. Doubtless, if all we need lay stress upon is that it connects two parts of the ocean, and is wholly in the territory of one power, we are justified in concluding that it must be treated in law as a narrow arm of the sea. But surely the fact that it is an artificial channel must count for a great deal. Everyone would admit that a road across the Isthmus of Suez would be under the complete control of the territorial power: and it is difficult to see why the rights of the

¹ See Article by M. L. Renault in *La Loi*, August, 1882.

local Sovereign are destroyed, if for a road we substitute a trench, and fill that trench with water. A strait created by the labour and ingenuity of man cannot be in all legal aspects the same as a strait found by man ready to his hand. The latter may justly be regarded as part of the natural heritage of the human race; the former has no claim to any such position. Mankind can use the one in such a way that the enjoyment of its advantages remains common to all; but, apart from special agreement, they have no right of unrestricted passage over the other. And this, which is the conclusion of common sense, is also the doctrine which must be deduced from the practice of nations, as a short historical review will show.

The old claims to exercise rights of sovereignty over portions of the high seas have been expressly or tacitly withdrawn. The Chief Magistrate of Venice no longer weds the Adriatic, bidding all other nations refrain from adulterous intercourse with his bride. Portugal no longer claims the right of exclusive navigation of the Indian Ocean; nor does Spain contend that her ships alone shall cross the broad expanse of the Pacific. England's assertion of dominion over the seas around her shores from the Shetlands to Cape Finisterre, and even to the coast of America and the unknown regions of the North¹; gradually dwindled, till it became a claim that her flag should receive certain ceremonial honours; and finally it has died out altogether. The famous *Mare Clausum* and *Mare Liberum* controversy has ended by the victory of the advocates of *Mare Liberum* all along the line. And long before the doctrine that a state might appropriate portions of the high seas was given up, it was con-

¹ Selden, *Mare Clausum*, Bk. II. ch. i.

ceded that rights of sovereignty, if they existed, did not include the right to forbid the peaceful navigation of such waters by the ships of other states.

But while oceans and seas were being slowly and painfully restored to their original position of highways open to all, the old exclusive ideas still lingered in the case of narrow straits which passed wholly through the territory of one power. At first they could be shut altogether if the local Sovereign chose. But, as a rule, tolls were levied; and other powers had to submit to whatever exactions the fortunate possessors of the straits thought fit to impose. Then the incidence and amount of the tolls became a matter of international concern, and sometimes states gained by war the right to a voice in fixing the dues which their subjects paid. The next stage is marked by the assertion of the principle that the waterway between two seas may be navigated as freely as the seas themselves, and by the consequent abolition of the tolls. Thus Denmark found herself in 1857 unable any longer to levy the Sound dues, though she could claim in their favour a prescription of something like 600 years. She was obliged to agree to a convention which abolished the tolls, and, without recognizing her right to levy them, gave her a large indemnity as compensation for the burden of maintaining lights and buoys for the future. The case of the Bosphorus and the Dardanelles is anomalous in that it is regulated by special treaty, and does not come under the common law of nations. Putting it on one side, we find a steady progress towards complete freedom of navigation. Sovereignty over the high seas has vanished entirely. Sovereignty over narrow straits, the free navigation of which is essential to the use of the high seas, has not indeed vanished, but it has been limited

by the creation of a sort of servitude—by the grant to all nations of an undisputed right of innocent passage. No power can levy in those of its territorial waters which are adjuncts to the navigation of open seas any tolls for profit. It may, in the absence of other arrangements for the support of buoys and lights, charge dues sufficient to maintain them, but it may not derive a revenue therefrom. Even if at war, it may not close the straits to the peaceful passage of neutral ships. Both sides may carry on belligerent operations therein, but, unless the enemy can blockade the entrance to the straits, the freedom of navigation subsists in spite of the existence of war. And it is exceedingly probable that if in any future war the neutral powers happen to be strong at sea, they will not permit either belligerent to blockade a strait belonging to the other, if by so doing an important avenue of commerce is closed.

The rights of territorial sovereignty have, however, been subjected to no further limitation in the matter of passage. The theory of Grotius¹ that a general right of transit was reserved when nations first acquired separate territorial possessions has never been acted upon by the states of modern Europe. It influenced for a time the law of neutrality; but for nearly a century statesmen and publicists have ceased to hold that a belligerent may force a passage for its troops over neutral territory, if the neutral refuses permission for them to cross. They have even embraced the opposite doctrine that no neutral state can grant such a passage without a gross violation of its neutral duties. When, therefore, the Marquis of Salisbury argued in the House of Lords on July 17, 1883,

¹ *De Jure Belli ac Pacis*, Lib. II. ch. II. § 13.

that there was "a natural right of passage across the Isthmus of Suez for the commerce of the world," he made one of the most remarkable assertions that the exigencies of party warfare ever compelled a statesman to maintain. His words imply that no nation has a right to impose conditions upon the use of its territory for purposes of passage, whenever such passage is important to commerce. So enormous an extension of the right of innocent passage is wholly unknown to International Law. Among the powers of sovereignty is reckoned the right of regulating or refusing transit across territory. Since a passage through narrow straits connecting open seas is necessary to the enjoyment of the right to navigate the seas themselves, the Law of Nations has thrown such straits open to peaceful navigation. But further it has not gone. With regard to its harbours, its rivers, its roads, a state is supreme. It may follow what policy it pleases, even the short-sighted one of total exclusion.

It is plain that these considerations have a very important bearing upon the case of the Suez Canal. If it be in law an arm of the sea, the Canal Company has no right to levy tolls in order to earn dividends for its shareholders. Whatever concessions the company may have received from the Egyptian Government and the Sultan, it would still, in taking dues for profit, be in the position of a high-handed aggressor upon the rights of nations: and the Governments which share the sovereignty of Egypt would be accomplices in the wrong; for no single power or group of powers can, at their own pleasure, ride roughshod over the common law privileges of all the rest. Now, as no one doubts the right of the company to levy tolls, it follows that in the view of practical statesmen the canal is not exactly analogous to

a narrow strait connecting two open seas, and is not subject to the same rules as such straits. And further, if it be such a strait, any power at war with Egypt would have a right to blockade its entrance, just as France would have a right to blockade the Solent, if she were at war with England. I venture to think that not only England, but all the maritime powers who use the canal, would strenuously object to any such proceeding. In 1877 Lord Derby intimated to Russia, then at war with Turkey, that any attempt to blockade the canal, or otherwise obstruct its use, would cause England to renounce her attitude of neutrality. Not only did all the neutral powers applaud this declaration; but the Russian Government itself replied that it considered the canal an international enterprise, which ought to be exempt from attack. It would have been hardly possible to win the universal approval of neutrals and the acquiescence of belligerents for an act which, if the canal was subject to the same rules as a natural channel, curtailed in the interests of England the undoubted rights of the parties to the war.

In truth, the artificial character of the canal, which the advocates of the theory that it is an arm of the sea put aside as non-essential, is one of the great material facts that rule the situation, and would be universally acknowledged to be so, were Egypt powerful enough to assert herself, and claim, in the settlement of the controversies now raging, the position which the territorial power ought to occupy. What would be thought of a claim on the part of the nations to navigate the Crinan or the Caledonian Canal without reference to the wishes of Great Britain? I do not think we in England should hear much of the theory that, since they connect two

portions of the high seas, they must be regarded as subject to the same legal rules as natural channels, and that therefore we have no right to impose what conditions we please upon their navigation. We should rather act upon the doctrine that, when an artificial connection is made between two seas, the territorial power is at liberty to impose conditions upon the use of it, or even to close it altogether. Nor do I think that our views would be much modified, if, instead of making a new communication, we restored an old one which, like the ancient channel between the Isle of Thanet and the mainland of Kent, had once been a natural strait. But it is of little use to cite purely hypothetical cases. They may be left to take care of themselves when they arise. The Crinan Canal affords a far better illustration; and no one doubts that the exclusive right to lay down rules for its navigation rests with the territorial power, which may indeed delegate its authority to an individual or a corporation, but is in no way responsible to other nations for the conditions it imposes.

This seems to bring us to the second theory with regard to the legal position of the Suez Canal; but I do not wish to argue for one moment that it is under the complete control of the local Sovereign. My object has been to point out that its artificial character, instead of being immaterial, is really most important. If we allow due weight to it, we are certainly driven to the negative conclusion that the position of the canal, according to the common law of nations, is not that of an arm of the sea. Are we also compelled to acknowledge it to be that of an ordinary land road or water-way wholly within the territory of one power? I think not. In fact, we are in the presence of a number of conflicting analogies;

and nothing but confusion can arise from seizing upon some to the neglect of others which are equally important from a legal point of view.

A close examination of the case will reveal the following points:—

- (1) The Suez Canal is a narrow strait between two open seas.
- (2) It is wholly within the territory of one power.
- (3) It is an artificial channel.
- (4) It is so narrow that the use of it for purposes of active warfare closes it to commerce.
- (5) It was made, and is worked, by a commercial company, under concessions from the Khedive, confirmed by the Sultan.
- (6) The company has an undisputed right to levy tolls for profit on vessels using the canal.
- (7) It has more or less an international character and constitution.
- (8) Various powers have from time to time entered into negotiations with it, and with one another, concerning the canal.
- (9) Legally, the sovereignty over the territory through which the canal is cut is shared between the Khedive and the Sultan; but as a matter of fact, the British Government exercises much more control over the former than his nominal Suzerain, England being in her turn restrained by the necessity of obtaining the assent of the European Concert for any very important steps she may wish to take.

The first of these facts, if it stood alone, would bear out the contention that the canal is subject to the same rules of International Law as a narrow natural strait

connecting two portions of the high seas; and the addition of the second in no way invalidates this conclusion. But the third, as I have already shown, brings with it an entirely new class of considerations, based upon the legal right of a state to control all roads and ways within its territory. The junction of the third with the second gives us the perfectly true proposition that the Suez Canal is an artificial channel wholly within the territory of one power, and thus at once suggests that, legally, it is under the control of that power, or of any individual or corporation to whom it may choose to delegate its authority. And this conclusion is rather strengthened than weakened by the fourth proposition, which lays stress upon a physical fact that of itself limits the right of innocent passage. When the British fleet seized the water-way in August, 1882, the passage of merchant vessels was suspended for twenty-four hours. The commanders of the expedition, acting on behalf of the local Sovereign, had a right to interfere with peaceful commerce as far as the exigencies of warfare demanded. But I doubt very much whether they would have possessed any such right if the canal had been in law a narrow strait uniting two open seas, though I fully admit that the question is not free from obscurity. The fifth and sixth points suggest the same conclusion as those immediately preceding them. Without a concession from the local Sovereign, the canal would never have been made. No one had a right to pierce the isthmus unless permitted to do so by the territorial power. The Khedive and the Sultan could not grant greater rights than they themselves possessed. They granted, and all the world recognized, the right to cut a canal and levy tolls. They must, therefore, have possessed the right to

do these things themselves if they had chosen ; that is to say, their power with regard to making a water-way, and fixing conditions on the use of it when made, was in some respects the same as their power of regulating the navigation of the Nile, or the transit of travellers across the isthmus in the old days of the Overland Route.

The seventh point introduces a wholly different series of considerations and analogies. The opposition of Lord Palmerston deprived the company of the cosmopolitan character originally designed for it, and allowed French influence to predominate. But it has never been entirely French. The statutes declare that the governing body shall consist of members representing the principal nations interested in the enterprise¹. In 1875, when Lord Beaconsfield's Government bought the Khedive's shares for four millions sterling, it was stipulated that three English Directors were to be nominated by the British Government ; and by the agreement of 1883 between M. C. de Lesseps and the British Shipowners, seven new English Directors were to be added to the existing Board. Moreover, the Concession of 1854 described the company which M. de Lesseps was authorized to form as "*une compagnie formée de capitalistes de toutes les nations*," and "*une compagnie universelle*," and bound it to afford equal treatment to ships of all nations. Something of an international character was thus stamped upon the undertaking from the first ; and the subsequent proceedings of the maritime powers have shown that they are not disposed to let this side of it be ignored. They have from time to time entered into negotiations and agreements with one another and with

¹ *Statutes of the Suez Canal Company*, 1856, Tit. III. Art. 24.

the company about the canal. This is our eighth point; and a little consideration will show how important it is. Just as the fact that the canal is an artificial channel upsets the doctrine that it is in law an arm of the sea, so does the fact that powerful states have made it the subject of understandings and conventions upset the doctrine that it is an inland water-way, subject entirely to the control of the local Sovereign. If it were so, other states would have no *locus standi* in dealing with it. We should not think of claiming a voice in the management of French canals and railways; neither should we allow the claim of any other country to a share in the regulation of our own. Still less should we recognize the validity of agreements made between foreign countries for the purpose of controlling in any way the use of one of our great arteries of communication, say the railways between Liverpool and London, which may be regarded as part of the main line of traffic between North America and the Continent of Europe. Yet proceedings similar to these have been taken with reference to the Suez Canal, and by no power more frequently than by England. In 1871 we took part in abortive negotiations for the purchase of the canal by the maritime powers, and its management by a European Commission, like that which has controlled the mouth of the Danube since 1856. In 1873 we joined with the other maritime powers in insisting upon a revision of the method previously adopted by the company of calculating the tonnage of vessels for the purpose of levying transit dues. In 1875 occurred our purchase of the Khedive's shares. Other states immediately asked for and received explanations, and many of them expressed approval of the transaction. The Earl of Derby, then Foreign Secretary, in a speech delivered at

Edinburgh on December 17, 1875, defended the purchase of the shares, and recognized the fact that important transactions concerning the canal came properly under the cognizance of the powers, in the remarkable words, "We have told Europe what we want, and why we want it, and Europe is in the habit of believing what we say." In 1877 came our negotiations with Russia to secure that the freedom of passage through the canal should not be interrupted by warlike operations. Had the canal been in law either an arm of the sea, or an inland water-way, we should have had no right to interfere in the matter. But as it possessed, to a perceptible though undefined extent, an international character, all that can be said of us is that we took advantage of the multiplicity of its attributes to insist upon those among them which favoured our purpose for the moment. In 1882 we sent an expedition to Egypt, and based our right to do so on the ground that neither England, nor the other powers, could tolerate a condition of disorder there which might endanger the safety of the canal. Throughout the transactions connected with this enterprise, Mr Gladstone, the then Prime Minister, was most careful to acknowledge the right of all the powers to a voice in the matter, and on no occasion was he more explicit than when, in his speech of July 23, 1883, making public the withdrawal of the scheme for a new canal, he said, "I wish to announce that we cannot undertake to do any act inconsistent with the acknowledgment, indubitable and sacred in our eyes, that the canal has been made for the benefit of all nations at large, and that the rights connected with it are matters of common European interest." Since these words were spoken they have been acted upon to the full. The present year (1885) has witnessed negotiations for deter-

mining, by general agreement, the international *status* of the canal; and though they have not been brought to a successful issue, they cannot be said to have failed entirely. They seem now (August, 1885) to be in a state of suspended animation, ready to be brought back to vigorous life as soon as the more pressing difficulties of Egyptian finance and government are satisfactorily settled.

Not only has the canal been made a subject of negotiations between the Great Powers, but the company to which it belongs has been invested with a quasi-diplomatic *status*, and has entered into agreements and conventions with states other than the territorial power, as if it were to some extent a body recognized by International Law. In an informal manner M. de Lesseps has been treated for many years more like the envoy of a Sovereign than the chairman of a commercial company. His "Yea" or "Nay" has been a most important factor in negotiations, almost the only occasion on which it was received with scant ceremony being when he protested in the fashion of an injured potentate against the seizure of the canal by the British in 1882.

The ninth point refers to facts which are notorious. It will not, therefore, be necessary to discuss them at any length. If we turn to the text of international documents, the Sultan is Sovereign in Egypt. If we draw the only natural conclusion from the provisions of those documents, the Sultan and the Khedive are jointly Sovereign. If we look at the facts of the case, and the history of the last few years, we find that the Sultan's authority is little more than a shadow, that first England and France together, and then England alone, have exercised over the Khedive the powers of a Suzerain, and that behind

the nominal Sovereign and the actual Suzerain stand the Great Powers of Europe, claiming the last word in all important arrangements. Surely these things point to the conclusion that the canal is already, to a certain extent, under the authority of the Great Powers, though no formal treaty gives them any rights over it.

The result, then, of our investigation has been to bring into prominence a number of diverse characteristics. We have divided them into three groups. Each group, if it stood alone, would justify a definite legal conclusion. From one set of attributes we might argue that the canal was in law a narrow strait between two open seas; from another that it was an inland water-way, subject entirely to the authority of the local Sovereign; and from a third, that it was a great international work, under the control of the leading Powers of Europe. At every turn it presents a conflict of analogies. In some respects it resembles the Solent or the Little Belt, in others the Crinan Canal, in others the mouth of the Danube. It is anomalous, and everything about it is anomalous. None but itself can be its parallel. Never before in modern times has there been a Suez Canal, never a Canal Company so constituted and so privileged. Never has sovereignty over so important a portion of the earth's surface been so strangely shared between a number of powers. Never have stubborn facts been more entirely at variance with diplomatic fictions. Never have the rights of a territorial power been more lavishly granted away, or more cavalierly set aside.

Now, since there are no precedents to guide us, and since the analogies applicable to the case are many and diverse, we are forced to the purely negative conclusion that, agreement apart, International Law does not afford

any rules for the conduct of states in reference to the Suez Canal. An attempt to settle its position "according to the common law of nations," is an attempt to fix and define that which does not exist. Nor can we fall back upon any general agreement embodied in a great international treaty; for nothing of the kind is in being. If we ask for precedents, none are forthcoming; if we reason from analogy, we are lost in confusion; if we search for an agreement, we cannot find one. There is no other method. We are obliged to confess that International Law fails to give us any clear and consistent set of rules for the guidance of states in reference to a most important commercial highway, which has been in existence since 1869.

Lame and impotent as this conclusion seems, a little consideration will show that it is not so very extraordinary. There are many instances in history of the temporary break-down of a legal system for want of rules applicable to a new set of circumstances. When first gifts of land in trust became frequent in England, the Courts of Common Law refused to deal with them. The feoffor they knew, and the feoffee they knew; but who was the *cestui que trust*? There was nothing, therefore, except a man's own right feeling, to keep him from accepting a gift of an estate in trust for another, and then enjoying it himself. And not till Equity stepped in, and filled with its rules the gap left open by the inelasticity of Common Law, were such scandals rendered impossible. International Law itself will supply us with another case in point. The discovery of America gave rise to a vast number of disputes, which the scanty International Code of the middle ages was quite unable to settle. It had dealt with territories possessed by

states sufficiently alike in organization and ideas to be capable of entering into relations with one another; but it possessed no means of unravelling complications with regard to the character of the acts necessary in order to obtain dominion over newly discovered territory, the nature of the rights, if any, possessed by the original inhabitants, and the extent of country acquired by one act or series of acts of discovery or colonization. Grotius, and the publicists who with him founded modern International Law, obtained the new principles that were wanted from the rules of the Roman *Jus Gentium* on the subject of Occupancy. Difficulties were so far met that a law was provided to which states might appeal; but its ambiguity caused almost as many disputes as the previous absence of law. Still it was a great advance to obtain general acceptance for any set of rules, however imperfect. It was better to appeal to an ambiguous law than to have no law at all to invoke. With regard to the Suez Canal, states are in the latter predicament. And though mutual forbearance, and the modern horror of war, which is due partly to mere commercial considerations and partly to much higher motives, have hitherto prevented anything like a general conflict; yet it is impossible to doubt that such a calamity may occur at any time, unless speedy means are taken to remove the present uncertainty as to the rights and duties of all the parties interested.

A passing glance at the conduct of our own country in reference to the canal, will, I think, be sufficient to demonstrate that in practice as well as in theory there is no law binding on states in the matter, and that they therefore follow any policy which suits their interest for the moment, without troubling themselves much about consistency. I must again call attention to the fact that in

1877 Russia was at war with the Turkish Empire, and consequently possessed all the rights of a belligerent against Egypt, a province of that Empire. Egyptian troops took part in the war on the side of the Sultan, and Egyptian vessels carried soldiers and supplies from Egyptian ports to the scene of conflict. But our Government gave Russia to understand that any attempt on her part to attack Egypt or "to blockade, or otherwise to interfere with, the canal or its approaches" would turn Great Britain from a neutral into an enemy. It might be inferred from our action on this occasion that we had adopted, as the foundation of our national policy with regard to the canal, the doctrine that it must be free altogether from active hostilities. But in reality we have done nothing of the kind, for in 1882 we occupied it from end to end, and made it the base of our warlike operations in Egypt. We threatened Russia with war, if she exercised her undoubted belligerent rights in a country whose resources were being used against her; and yet, a few years afterwards we ourselves carried on hostilities along the very canal whose freedom from them was the ground of our previous interference. When it suited us to regard the canal as if it had been in a measure neutralized, we so regarded it. Again, when it suited us to treat it as an ordinary means of communication in an occupied district, we so treated it. The Gladstone Ministry proclaimed that it must be regarded as an international work, at least to the extent of admitting that other states have a right to a voice in regulating its development. On the other hand Lord Iddesleigh, when Leader of the Opposition in the House of Commons, argued in 1883, with reference to the agreement negotiated in that year between the Government and M. de Lesseps, that we

could treat the canal as the private property of a private company, the agreement being merely a business arrangement between the English Directors and their colleagues¹. It is no part of my present purpose to discuss the validity of these contentions. The fact that many strong arguments may be brought forward on behalf of each of them tends to justify the main proposition of this Essay, that the whole question is legally in a state of the most utter confusion, and that there is great danger in allowing it to remain so.

I am far from blaming our rulers. They have rarely, if ever, acted with real injustice in these matters, though technically they have been inconsistent. Generally, they were in advance of public opinion in their respect for the susceptibilities of other states. When they have taken vigorous action, they have been able to show that the interests of the greater part of Europe were bound up with the interests of England. But a time may come when this fortunate coincidence will no longer exist; and we cannot then expect that the maritime powers will allow us to work our will to their detriment.

Suppose, for instance, that France and Italy, or France, Italy and Holland were at war with Turkey under circumstances which caused the Khedive to range himself heart and soul on the side of his Suzerain. The Egyptian Government would, no doubt, endeavour to occupy strategic points along the banks of the canal, in order to prevent the passage of hostile vessels. Indeed it expressly reserved the right to do so by Article X. of the Convention of 1866. M. de Lesseps and his French officials would certainly resist, and a French expedition

¹ *Hansard* for 1883. Vol. CCLXXXII. p. 154.

might come to their aid. Turkey, being a naval power, would probably assist its vassal state. The canal and its approaches might easily become the scene of long and severe combats, which might end in the Turks and Egyptians retaining possession of the water-way, while the combined fleets of their enemies blockaded them in it. But, whatever the result of the strife, British commerce could not possibly escape most disastrous interruption while it lasted. If we endeavoured to keep the enemies of Turkey from attacking the canal, we should not, as in 1877 when we warned off Russia, have the support of the chief maritime powers. For France, Holland, Germany and Italy are, after ourselves, the nations most interested in maintaining freedom of passage. But the Egyptian forces would certainly, if left unmolested, close the canal against the vessels of their enemies. We could not expect those powers to submit quietly to such an interruption of their trade. Russia could acquiesce in our views in 1877 because few of her ships ever use the canal. But 499 French, Dutch and Italian vessels passed through it in 1884; and we may be sure that no states, unless compelled by superior force, would allow an enemy to destroy so large a commerce without striking a blow in its defence. If, on the other hand, we endeavoured to purchase for the canal immunity from hostile attack by restraining Egypt and Turkey from acts of war upon it, we should be obliged to keep watch and ward over the water-way ourselves, in order to prevent the exercise of their undoubted belligerent rights in a portion of their own territory—a proceeding which would, in all probability, lead to the very interruption of commerce it was designed to prevent: for we might find the occupation of the canal

in the teeth of the armed opposition of the Ottoman forces a much more difficult task than its seizure in 1882, when few missiles more deadly than the protests of M. de Lesseps were discharged against us. Our best resource would be to bring about an agreement between the belligerents to regard the canal as a neutral waterway. But it would be very difficult to do so, if their passions were strongly aroused. Neither side would have a vital interest in keeping the navigation open. Each would be more attracted by the chance of severely wounding its enemy, than repelled by the certainty of deeply injuring a neutral. If we threatened war against whichever first laid hands upon the passage, we should simply be taking elaborate precautions for the due shutting of the stable door after the steed was stolen. And we might meet with a verbal acceptance of our views, while in practice they were disregarded. What would there be, for instance, to prevent the Egyptian Government from giving a quiet hint to some Arab Sheikh; and then expressing the utmost grief and consternation when, one fine morning, a portion of the canal was found to be destroyed by an explosion of dynamite? After all, only the hated Giaour would suffer, and whether he were belligerent or neutral would not matter much.

In fact, under present circumstances, there is no guarantee for the security of the canal. The Eastern Question is a gunpowder magazine, which may explode at any moment. Not very long ago there was for a little while a complete calm. To-day everything is in confusion, owing to the rebellion of the Mahdi, and even if his recent death puts an end to the movement he headed, its effects will be felt for a long time to come in the

stirring of difficult questions and the rousing of international jealousies. We cannot expect that a prolongation of the present state of uncertainty will be attended for an indefinite time by the same immunity for our commerce that it has hitherto enjoyed. Our shortest route to India may soon be in imminent danger. Negotiations with the Great Powers are actively proceeding in order to discover a solution as little unsatisfactory as possible of the problems of Egyptian finance and Egyptian Government. Efforts have also been made both to settle the exact legal position of the canal by general agreement, and to dispose by purchase or otherwise of the troublesome claims of M. de Lesseps and his company. But up to the present time they have not been successful, partly, no doubt, owing to the great complexity of the questions involved and the vast number of opposing interests to be conciliated, but partly also because the true method of combining instead of separating the two branches of the problem has never been followed. Hitherto negotiations for neutralizing the canal by international action have been kept distinct from negotiations for defining and buying up the interests of the Canal Company. I venture to think that it is possible for the Concert of Europe to deal with both together, and remove all difficulties by one comprehensive scheme.

But before we come to the consideration of such a scheme it will be well to pause for a moment in order to discuss the proper attitude of mind in which England should approach the problem. From the year 1872, when we first began to send troops to India through the Suez Canal, we have been accustomed to regard its safety, and the freedom of navigation through it at all times, as essential to the security of our Empire in the East. The

route by the canal is so much shorter than that by the Cape of Good Hope, that the time saved by using it might make all the difference between victory and defeat in the event of an insurrection in India, or an invasion of the country from outside. We have, therefore, made it a fundamental object of our policy to keep the canal clear at all risks; and in our negotiations with other powers we have again and again refused to be a party to any arrangement which did not recognize a right of innocent passage for ships of war as well as vessels of commerce. And even when this point has been conceded, we have declined to agree to any scheme for the protection of the canal, which would put it in the power of other nations to block the way against our transports on the pretext of carrying out necessary measures of police. Undoubtedly these precautions have not always tended to the success of international negotiations; but no unprejudiced person can deny that they were forced upon us by a proper regard for our own interests. No attempt at a solution of the Egyptian problem can hope to succeed, unless it recognizes the patent fact that from both a political and a commercial point of view the stake of Great Britain in the Canal is greater than that of all other nations put together.

But on the other hand we in England must not forget that our neighbours have great and important interests in that quarter. In common justice we are bound to listen to their contentions, and meet their views as far as possible. Moreover, whether we like it or not, Egyptian affairs have been matters of international concern since 1839—41, when the Great Powers intervened to check the victorious career of Mehemet Ali, and obtained for him from the Porte the hereditary Pashalic of Egypt, on

condition that he gave up the rest of his conquests. From that time to the present all British Governments have acknowledged that the Concert of Europe must be invoked, whenever it becomes necessary to deal with the political aspects of the Egyptian question. The cry sometimes raised that, because we are in military occupation of the country, we have both the power and the right to settle matters as we please with a single eye to our own immediate interests, is one of the wildest follies ever produced by the union of abject ignorance and unscrupulous greed. We cannot act separately, and we ought not if we could. Europe alone, by the active co-operation of the Great Powers and the assent of the smaller ones, can settle these questions. All we have a right to demand is that England shall have the most authoritative voice in the deliberations. And while we ask no more, our interests and our sacrifices compel us to be content with no less.

But when the representatives of England come to the discussion of details in the council chamber of the powers, they will now be in a better position than they were a few months ago, owing to an event which is about to happen in a distant portion of the globe. I refer to the opening of the Canadian Pacific Railway. By the middle of October, 1885, a line of rails will stretch across the continent of North America from Halifax on the Atlantic seaboard to Vancouver on the Pacific, traversing the entire distance from ocean to ocean through British territory. The importance of this railway can hardly be overestimated from an imperial point of view. Its influence on the development of the great Canadian Dominion cannot fail to be enormous. Englishmen have yet to realize that they possess in North America

an area larger than that of the United States, and capable of supporting in comfort a population of at least a hundred millions. As soon as this is fully borne in upon the popular mind, we shall hear little more of the short-sighted policy which regards our colonies as an encumbrance to be shaken off on the first decent opportunity; and our statesmen will begin to occupy themselves in devising plans for strengthening the unity of the Empire, and binding together in one great free confederation the mother country and the young and vigorous nations to which she has given birth.

But the contemplation of the vast possibilities of the future, in the realization of which the Intercolonial Railway will play an important part, must not take us away from the consideration of its immediate influence upon the Egyptian problem. Halifax, its eastern terminus, is an 'Imperial station,' where is kept up the only garrison of British troops in the Dominion of Canada. On the receipt of a telegraphic order from the home government, the 2000 or 1500 soldiers stationed there could immediately proceed by railway across the continent. They would reach the Pacific at the new city of Vancouver on Burrard Inlet in five days; and meanwhile their places at Halifax could be supplied by Canadian Militia till a new garrison arrived from England. They could be conveyed from Vancouver by sea to Calcutta in thirty-three or thirty-four days, stopping on the way at Hong Kong and Singapore to pick up reinforcements from the imperial garrisons stationed there. Thus a force of from three to four thousand men could be thrown into India in about thirty-eight or thirty-nine days from the time when the order to start reached the officer in command at Halifax. Now it takes just thirty-eight days to make

the voyage from England to Calcutta *via* Gibraltar and the Suez Canal. Thus we see that as regards time the two routes are in very much the same position, whereas the route by the Intercolonial Railway has this great advantage, that the land portion of it passes entirely through British territory. As long as we keep command of the sea, it is perfectly safe from end to end. The canal may at any time be blocked by accident or design, but it is impossible to throw a barrier across the open ocean.

Let us now consider the bearing of these facts upon the defence of our Empire in Asia. If at the moment when it became necessary to throw troops into India there were no complications in Europe, we could send on at once the greater portion of our garrisons at Malta and Gibraltar. By using the canal they would reach Bombay in eighteen days from the former place and twenty-two from the latter; and by no other route could anything approaching the same celerity be obtained. But if the aspect of affairs in Europe was so threatening that we could not withdraw any appreciable number of men from our Mediterranean garrisons, reinforcements for India would have to come direct from England, and a choice of routes would lie before the home authorities. Even if our European foes were too weak at sea to make any attempt upon our transports as they crossed the Mediterranean, the Suez Canal route would be dangerous because of the impossibility of obtaining complete security for an absolutely safe passage. The route across the Canadian Dominion would be perfectly secure; for the chances are a thousand to one against our being embroiled with the United States while we are fighting a great European contest. But on the other hand it

would be longer by the eight or nine days needed to cross the Atlantic. Yet this disadvantage could be obviated to a great extent by sending on the garrison of Halifax in the manner described in the preceding paragraph; and it might be possible to send after it within a few days the greater part of the garrison of Bermuda. They would be the advance guard of a continuous stream of reinforcements from England, which would reach India at short and frequent intervals till all the troops that were needed had been sent. But it must not be forgotten that forces from England *via* the Suez Canal could be landed at Kurachee for service on the North-West frontier of India, whereas troops from Halifax would be landed at Calcutta or some other port on the Eastern side of the peninsula. Thus the balance of advantage as between the two routes might incline to one side or the other according to the part of India where the soldiers were required. Our wisest policy will be to stand prepared to use either, or both, as circumstances may direct. Meanwhile the intercolonial route should be improved, and made absolutely secure. The Atlantic terminus at Halifax is already protected by a powerful fortress. The Pacific terminus at Vancouver needs to be guarded by strong works; and fortunately Burrard Inlet, on which it lies, is capable of easy defence. Nanaimo also, on the opposite shore of the Strait of Georgia, should be fortified in order to secure the safety of its coal mines, which are the best on the North Pacific, and conveniently situated for the supply of vessels.

It must now be evident to the most hasty reader that England's position with regard to the Egyptian question has been greatly altered by the opening of the Canadian

Pacific Railway. The Suez Canal is still of the utmost importance to us, and as far as our commerce with the East is concerned there will in all probability be little difference between the old state of things and the new. But a free passage through the canal for our transports at all times and under all circumstances is by no means so essential to the defence of the Empire as it was a short time ago. We have, therefore, far greater liberty of action in dealing with the other powers, than we had before. On the one hand, we can with safety accept proposals as to the guardianship of the canal, which involve some slight and remote risk that measures of police may be enforced against us at a critical time, more from a desire to injure us than because our proceedings cause any real danger to the traffic. Now that we have an alternative route to India, we may be able to purchase other advantages in the settlement of Egyptian affairs by giving our consent to an arrangement concerning the canal, which prudence would formerly have compelled us to decline. On the other hand, the necessity of coming to an arrangement of some kind is not so great as it was. If the powers should endeavour to take advantage of our position as rulers of India to impose upon us conditions which we deem altogether inadmissible, we can decline to enter into any agreement at all, and leave them to do their worst when a crisis arrives. The continuation of the present state of uncertainty as to the legal position of the canal is no longer as dangerous as before. A settlement of the difficulty is most desirable, but it is not so essential that we need concede more than we deem just and right in order to get it.

Having thus attempted to indicate what is the true attitude for our country to take up in discussing the

questions connected with the Suez Canal, we can now turn to the consideration of the best practical solution of those questions. The neutralization of the canal is the project which has received the greatest amount of support. The statesmen and jurists of Europe have seen in it the best means for protecting what they cannot but regard as a great international work, and securing its free use to all on equal terms¹. When in 1838 Mehemet Ali contemplated cutting a canal from sea to sea, he was advised by Prince Metternich to get it neutralized by European treaty. What was to him but a magnificent idea has been made an accomplished fact under his successors; and the great French engineer whose genius has translated the dream into a reality has never ceased to press upon the Powers the propriety of declaring the canal neutral by international agreement.

But though the principle of neutralization meets with general favour, and is in itself clearly just, as being the only means whereby the canal can be preserved at all times as a great highway of peaceful commerce, many difficulties stand in the way of its practical application. To begin with, there are not wanting jurists of great reputation who argue that ships of war have no right of passage through a neutralized water-way. I hold that they are wrong in their view of the rules of International Law applicable to such passages; but there can be no doubt that their opinion has great weight. It would, therefore, be necessary to insert in any convention entered into for the purpose of neutralising the canal, a clause declaring that vessels of war could freely pass to and fro as long as they performed no acts of hostility

¹ See *Annuaire de l'Institut de Droit International*, 1879-80.

within it. Great Britain, whose interests in the matter are far greater than those of any other state, would never consent to an arrangement which would debar her from the use of the canal for the purpose of sending troops to India.

Assuming this difficulty to be settled, we are immediately met by another and a greater one. The territorial power would have to be authorised to suspend the neutrality of the canal in case it was itself attacked; for it could not be expected to look calmly on, while its enemy's fleet passed through in order to take up an advantageous position for a bombardment or a landing. But this exception to the general rule would give rise to endless trouble. Earl Granville, in his circular despatch of Jan. 3, 1883, afforded conclusive proof of the difficulty, not to say impossibility, of drawing up a satisfactory plan on these lines¹. After laying down, as general principles, that the canal should be open to navigation at all times, and that it should be free "from obstruction or damage by acts of war," he proceeded to suggest for the consideration of the Great Powers a code of eight rules, drawn up with the object of securing the application of the above-mentioned principles. The canal was to be open to ships of war as well as merchant vessels; but in time of war the cruisers of a belligerent were not to disembark troops or arms in it, nor were they to remain therein beyond a fixed period. An exception was, however, made in favour of measures taken for the defence of the country. No doubt this was intended to cover such a case as our expedition to Egypt in 1882; but it is easy to see that it might create

¹ *Egypt*, No. 10, (1885).

under certain circumstances more difficulties than it solves. If Arabi, for instance, had deposed the Khedive before the arrival of our troops, it would have been very difficult for us to rebut the contention that we were making war on Egypt for the restoration of its dispossessed ruler, and not assisting the actual ruler against a military revolt which was rapidly superseding his authority. Even as things were, had Earl Granville's scheme been in operation at the time, it would have been open to any of the Great Powers to argue that Arabi was the *de facto* ruler of the country, and that in making war upon him we were attacking Egypt, and breaking a European agreement by our seizure of the canal.

Here, then, is a specimen of the difficulties that might, and probably would, arise from the attempt to reconcile two incompatible things, the neutrality of the canal, and the belligerency of the country through which it runs. Indeed the proposal we are criticizing, though it purports to do no more than "put upon a clearer footing the position of the canal for the future," does really go a long way in the direction of neutralizing Egypt itself. For it provides that in the event of the Turkish Empire being a belligerent, "no hostilities shall take place" not only in the canal, but also in Egyptian territorial waters. Whether this was meant to forbid active operations only, or whether it would not render unlawful a blockade of Egyptian ports, even though unaccompanied by any hostile attack, we have no means of deciding from the words themselves. They certainly need further elucidation; but even if they were made perfectly clear, the rule they set forth would be open to the objection that it placed Egypt in a most anomalous

position, and was grossly unfair to other countries. Egypt itself would neither be neutralized like Belgium or Switzerland, nor would it be free to take all the possible benefits and all the certain risks of war like a state of the ordinary type. It would be allowed to fight on land, and also on the high seas, but not in its own marginal waters. And conversely, it would be exempt from all attack by sea, though it might be invaded by land. In practice this would mean that no European power could attack Egypt, though Egypt might be actively engaged in warfare against it. An expedition might be fitted out in Egyptian ports with the purpose, let us say, of invading Greece. The Greek fleet might not attack it in its earlier stages; but would have to wait till it was fully equipped, and had assembled, started, and gained the open sea. If it evaded or defeated its foe, it might bombard the Piræus, and land troops for an attack on Athens, while the Greeks would be forbidden to retaliate by bombarding Alexandria or attempting to possess themselves of Damietta. Unless they could land an army in Tripoli or Syria, and march it across the desert to the frontiers of Egypt proper, they would be helpless. The military difficulties of such an enterprise would be enormous, and in fact Greece would be quite unable to take the offensive, in spite of her power at sea.

I cannot but think that this portion of the project set forth by Earl Granville in 1883 is quite unworkable. No doubt a mere neutralization of the water-way would be unfair to Egypt, since it would enable an enemy to use the canal as a means of passage for vessels of war, provided that they waited till they were through before commencing their attack. But the attempt to remedy

this injustice, by adding to neutralization a proviso in favour of self-defence, would give rise to more serious complications than it would prevent. There remains the plan of dispensing with a formal neutralization, and inducing the powers to declare by an International Act that they will never exercise their belligerent rights in the Suez Canal, if any of them should be at war with Turkey or Egypt¹. This is open to the objection that it amounts to neutralization with the most important part left out. An international guarantee of neutrality provides a sanction, if one power infringes it, in the obligation of the others to interfere against the offender. But a mere agreement to refrain from acts of warfare on a given spot has no force at its back to compel respect. I do not say that it would necessarily be broken; but I do say that the powers who were parties to it would lack an incentive to good faith which would exist in the case of a treaty of guarantee.

In fact the attempt to neutralize the canal, while it remains within the territory of a state which is not neutralized, is a hopeless task. The neutral character sought to be imposed on the water-way must necessarily clash with the belligerent character which the territorial Sovereign is free to assume. No human ingenuity can reconcile the two. If, therefore, the canal is to be in the future a great highway for the commerce of the world, always open to ships of all kinds, yet never exposed to the risk of danger from hostilities, it seems to me that the territory through which it passes must be erected into a neutral state under a European guarantee. So obvious are the advantages of such a course, and so

¹ *The Freedom of the Navigation of the Suez Canal* by Sir Travers Twiss in the *Law Magazine and Review*, Feb. 1883.

great the difficulties of the plan suggested in 1883, that in the following year Earl Granville added to his former suggestions one which altered their whole character. In June 1884 he proposed the neutralization of the whole of Egypt¹, and in the negotiations between the powers which took place at Paris in the spring of the present year, it was understood that Great Britain was desirous of some such arrangement. Nothing has at present been settled, and we are, therefore, free to consider whether this new proposal is better calculated than the former plan to attain the ends we have in view.

Undoubtedly if Egypt could be placed under European Government, or if the Egyptians could suddenly be endowed with the patriotism and capacity for affairs which distinguishes the people of Belgium and Switzerland, there would be some chance of a successful issue to the experiment of neutralization. But with a weak Tewfik or an extravagant Ismail ruling over a miscellaneous population of hereditary serfs, corrupt officials, shifting nomads and foreign adventurers, he must be a remarkably sanguine man who would venture to predict anything but disastrous failure. European Government is not possible under existing circumstances. The country must remain under Oriental rulers; and though some simplification of the present complicated and unwieldy administrative system might possibly be effected, yet it is hardly likely that such a clean sweep of it could be made as would take away from the Western States all right of interference in the internal affairs of Egypt. Either their subjects must be exempt from the local jurisdiction, or the judicial system

¹ Earl Granville to M. Waddington. *Egypt*, No. 23, 1884.

must be in Frankish hands ; for no state civilized on the European model could hand over any of its citizens to the tender mercies of Mohammedan tribunals. Thus, even if we adopt the somewhat improbable hypothesis that the powers in neutralizing Egypt will consent to the abolition of all the administrations, controls and commissions that have been established mainly in the interests of the bondholders and foreign officials, yet we find that their duty to their own subjects will compel them to limit the power of the local government in the exercise of one of the most important of its functions. From this would necessarily flow a right of interference in the internal affairs of the country ; and a door would be kept open for intrigues of all kinds, which might easily lead to violations of the guaranteed neutrality. To these dangers from outside must be added the strong probability of internal rebellion. In fact the chances are that the artificial edifice built up with painful diplomatic labour would fall like a house of cards as soon as it was left to stand alone.

In shewing how precarious would be the fabric of Egyptian neutralization I have not alluded to a preliminary difficulty which would have to be overcome before it could be reared at all. The country could not be properly neutralized, unless it was first cut adrift from Turkey, and made into an independent state. As a province of the Sultan's dominions it would be called upon to assist him when he was engaged in war ; and Europe is not likely to consent to an arrangement whereby he could draw from it military resources, and his enemies could not strike a blow at it in return. The neutralization of his whole Empire is out of the question. The only course that remains is to separate Egypt from

the rest of his dominions; and that could not in all probability be accomplished without an appeal to arms. The Great Powers might possibly be induced to coerce Turkey, if they saw some great and beneficial object to be gained thereby; but they would hardly face the dangers of an attack upon the Sick Man for the problematical good to be gained by the neutralization of Egypt.

We have now completed the examination of the plans which have been proposed with a view to a settlement of the legal and political difficulties which surround the Suez Canal question; and we have seen that though their object is the admirable one of securing the canal for all time as a peaceful highway, they are all either inadequate in scope or impracticable in working. Moreover none of them deal with the commercial difficulties arising from the privileged position of the Suez Canal Company. As a means of solving both branches of the problem at one and the same time, while avoiding the objections which are fatal to other schemes, I venture to suggest the creation of an Oriental Belgium of minute proportions, extending along the whole length of the canal, and to a considerable distance on either side of it. The new state would as a matter of course exercise territorial jurisdiction over the canal; and the management and control of the traffic should be placed in its hands under the conditions set forth in the following pages. Like Belgium it should be pledged never to resort to hostilities except in defence of its own frontier, and the Great Powers should bind themselves to refrain from attacking it, and to guarantee its safety from external foes. The Prince, who should be an hereditary Constitutional ruler, might be appointed in

the first instance by the Great Powers. He would rule over the towns of Suez, Ismailia, and Port Said, together with a number of less important places. The population of the new state would amount at once to nearly 50,000, of whom about 10,000 would be Europeans. Under a Western administration it would rapidly increase both in numbers and wealth; and from the beginning it would be numerous enough to defend its Eastern frontier from the scattered tribes of the Syrian Desert. More arduous warlike operations would hardly be required of it; for the guarantee of the Great Powers would be sufficient to protect it from the assault of any civilised state. This guarantee would, of course, be given on condition that the newly-created state placed no obstacles in the way of the free navigation of the canal, and maintained the water-way in good condition, for which latter purpose it should be authorized to levy tolls at a given rate, which might be subject to periodical revision. The treaty of guarantee would contain, as its chief stipulation with regard to transit, the provision that the canal and its approaches should be open to the passage of all ships at all times. Freedom from hostilities would be involved in the neutralization of the territory through which the water-way runs.

Of course this plan is not free from difficulties. They may be divided into physical and political. To trace a new line of frontier is never an easy task; but I see no reason why it should be particularly difficult in the present case. The question of the control of the Sweet-Water Canal seems to me the only one likely to give rise to complications. Ismailia depends upon this canal for drinking water; and as the supply is derived from the Nile, the town which would in all probability be the

capital of the new state, would be dependent upon Egypt for a necessity of life. This difficulty was well put by an Egyptian ex-official, to whom the present plan was propounded. "The Principality of the Canal," said he, "would be a state without water." The objection is, of course, not meant to be taken literally: for a full supply is obtained in the district now, and there is no reason to suppose that the conditions of life would be altered by an alteration in the political destination of the territory in question. There are many states whose interests in matters of very great importance are seriously affected by the action of powerful neighbours. Questions are continually arising connected with the control of the numerous rivers, railways and telegraph lines, which run through the territory of several states. But they are as continually settled by mutual agreement, and it is not likely that a small Principality protected by the guarantee of the Great Powers would be especially liable to receive ill-offices from a neighbour anxious to stand well with Europe. But I admit the extreme desirability of making the new state completely independent of the caprice or hostility of a neighbour in this important matter; and there is good reason to believe that the resources of modern science would be equal to the emergency.

The political difficulties are much more formidable. The consent of the Khedive and the Sultan would have to be gained, and the Canal Company would require compensation for the loss of its vested interest. The Khedive would, I think, find the advantages and disadvantages of the scheme so nearly balanced, that he would hardly feel disposed to refuse compliance with the request of united Europe, especially if it were backed up by earnest representations from the British Government,

to whom he owes his throne. He would have, it is true, to part with a small strip of territory, containing three towns of considerable and growing importance; and he would also lose the pecuniary advantage he obtains from his connection with the existing company. But this latter, which amounts to about £200,000 a year, being 15 per cent. on the net profits, might be capitalized at a reasonable rate, and the lump sum handed to him on condition that it was immediately applied to the reduction of the Egyptian debt. Any compensation it was deemed just to give for the loss of the reversionary interest in the canal possessed by the Egyptian Government should be devoted to the same purpose. Thus the burdens of the country would be reduced as its area was diminished, and the unfortunate fellah would for once derive some benefit from a transaction between his rulers and the Western powers. Against the small territorial loss might be set the increased security gained by the interposition of a well-organized state between Egypt and the wild tribes of the Desert which bounds the isthmus on the east, and also the freedom for all future time from the annoyance of having to deal with a *compagnie concessionnaire*, which has a habit of acting more like the master than the mandatory of the local Sovereign.

With regard to the Sultan, there would probably be much more trouble. Turklike, he would interpose objections and delays at every turn; and the more shadowy the rights he would be required to waive, the more tenacious would be his hold upon them. Still, if Europe were in earnest, it would find efficient means of overcoming his scruples. The threat to sever the connection between Turkey and Egypt, and recognize the independence of the Khedive, could hardly fail to take effect.

The Sultan should be made to understand that, if he did not give up his claims over a small portion of Egyptian soil, he would have to part with his rights over the whole. Under such circumstances, he might be trusted to choose the lesser evil. If, however, he remained obstinate, he could easily be brought to reason by a mere show of hostility. The united fleets of the Great Powers could force the passage of the Dardanelles and the Bosphorus with little difficulty; and once in possession of the Straits and the Sea of Marmora, they would cut the Turkish Empire in halves, and reduce its rulers to sue for peace on any terms. The Sultan's admirals would hardly be rash enough to offer serious resistance; and if they did, another Navarino would be a greater gain to humanity than was the first. The difficulty would be not to effect the coercion, but to get the powers to undertake it; and for a clearly defined and limited object they might be induced to do so. But if they were in earnest their end would probably be obtained by diplomatic means.

We have now to consider how the Suez Canal Company could be dealt with. There can be no doubt on general principles that the same sovereign power which gave the Concessions can revoke them; but justice demands that ample compensation should be given to the company for the surrender of its rights. Real difficulties would arise, first in determining with exactness what they were, and secondly in putting a fair value upon them. We need not go back to what is now ancient history, and review the controversy raised in 1883 by the action of the British Government in making the tacit recognition of an exclusive right to pierce the isthmus the basis of its negotiations for an improvement of the waterway. The only question worth serious dis-

cussion is whether the *pouvoir exclusif* is vested in the Canal Company for the full term of its ninety-nine years, or is personal to M. de Lesseps. If the latter view be correct, it will lapse at his death; and consequently the right of the company to exclude all competitors from the isthmus, though complete and absolute for the present, is held by a precarious tenure, and may at any moment come to an end. These questions of right should be settled by a competent international tribunal, as soon as possible. When they are decided, the question of value will arise. On this point there is a great deal of misconception abroad. Even if the fullest claims of M. de Lesseps are allowed to be valid, he and his company are not such entire masters of the situation as they are commonly supposed to be. Putting aside the plans for making alternative connections between the Mediterranean and the Red Sea, we have but to mention one notorious fact to make it clear that the statements about English commerce being delivered over to the company to be taxed and tolled at its pleasure are gross exaggerations. By the simple expedient of building vessels of a somewhat different type from those at present employed, British shipowners and merchants could send their goods around the Cape as advantageously as they now send them through the canal. Already meetings have been held with a view to do this by concerted action, if the annoyances and delays due to fussy officialism, and panicstricken ignorance masquerading in the guise of medical precautions against cholera, are not reduced within bearable limits. The men who obtained for themselves from the Canal Company in the autumn of 1883 better terms than the Government obtained for them in the preceding summer are not likely to sit still

while their trade is gradually strangled in a red-tape noose. No doubt they would submit to many inconveniences and some extortion rather than undertake the costly operation of rebuilding their commercial fleet. But they may be led to the gradual introduction of large vessels adapted for a long and rapid sea voyage; and if they combine for the purpose, the company will be ruined in a few years, since more than three-quarters of its customers are British. In fact they are taxed and tolled by M. de Lesseps just as long as it pays them to be taxed and tolled, and no longer. Not a ship would use the canal, if the dues were large enough to balance the disadvantages of the alternative route. The company is in the position of a monopolist, no doubt, but of a monopolist who dreads the competition of goods little inferior to his own, and only slightly below them in popular estimation. A small improvement in the alternative wares, a small change in the public sentiment, would be sufficient to destroy the fabric of its prosperity.

Under these circumstances, no very extravagant compensation need be paid. In 1871 the company was nearly bankrupt. Now (1885) its £20 shares are worth about four times that sum. Before long they may be far below their original value. A great deal will depend upon the decision as to the monopoly point. If another canal is needed the Khedive may refuse to allow the company to cut it. The existing channel may be seriously injured by the Arabs. A ship-railway may take away the larger part of the traffic. Political complications may render all communications across the isthmus useless for a time. There are a thousand chances of future calamity, and they ought to be taken into consideration. At any rate, M. de Lesseps is not in a position to dictate his own terms,

Assuming that fair compensation can be agreed upon, it is not difficult to indicate how the money should be raised. As in the case of the Sound Dues, each of the maritime powers should contribute in proportion to the value of its commerce passing through the canal. By far the largest share would be paid by this country; but the transaction would not be as onerous as it looks, for a large portion of the compensation money would come back to us, since we hold over 176,000 out of the 400,000 shares. Indeed, if it were thought fit to retain for a term of years anything approaching the present high rate of dues, the whole sum might gradually be returned to the states who provided it. An examination of the accounts of the company reveals the fact that a very small proportion of its enormous receipts is devoted to the administration and service of the canal. In 1882, out of a revenue of more than sixty-three millions of francs, the "charges" were said to amount to over thirty-one millions, leaving about an equal sum for distribution as net profit. But when we inquire more closely, we find that the "charges" include five per cent. interest on the share capital, interest on various loans and debentures, and provision for sinking and reserve funds, leaving only a little over six and a half millions for the expenses of working and maintaining the canal¹. During the last four years the annual receipts have been between two and three millions

¹ I have taken these figures from *The Suez Canal Question*, an able pamphlet by Mr Augustus Montgredien. On p. 7, he sums up the accounts as follows:—"Of the £2,422,000 paid by the 3,198 vessels which passed through the canal in 1882, *one-ninth* (£265,400) sufficed to defray the expenses; and no less than *eighth-ninths* (£2,156,600) were appropriated to interest, sinking and reserve funds, and profits!"

sterling, while the working expenses have fluctuated between two and three hundred thousand. It is obvious, therefore, that if the company was bought out at a reasonable price, the dues might be considerably reduced at once, and yet ample funds be forthcoming for improvements, and the gradual repayment of the purchase money, should the powers determine that it shall be refunded.

It would certainly be necessary to charge upon the profits of the canal the sum to be paid to Egypt; but, in any case, sooner or later the water-way across the Isthmus would be free from any tax levied for profit. It would belong to the proposed new state, subject to the right of way of all the world. That state should be bound by treaty to charge only such tolls as may be sufficient to maintain the canal in good repair, and provide for its protection. From time to time a Conference of Representatives of the Great Powers could be summoned to revise the scale of dues, and to decide what new works were required, and how the means of executing them should be raised. The periodical agreements with regard to the mouth of the Danube form excellent precedents. What Europe can do in the one case, it could do in the other.

The chief advantages of the plan I have sketched out are these:—

- (1) It neutralizes the Suez Canal, and fixes its legal position as an arm of the sea possessed by a permanently neutral state.
- (2) It avoids all difficulties connected with the suspension of neutrality when the territorial power is attacked.
- (3) It frees a great highway of the world's commerce from tolls levied for the sake of private gain.

- (4) It will bring to an end our troublesome and indefinite responsibility for good government in Egypt, as soon as we have got the country through its present difficulties.
- (5) It is not so likely to excite French jealousy as are plans involving exclusively British control of the isthmus traffic.
- (6) It delivers a small strip of territory from Oriental misrule.
- (7) It is just to all the parties concerned, the only person likely to be aggrieved by it being the Sultan, whose so-called rights have been already destroyed by events.
- (8) It settles by one measure both the political and the commercial complications that now exist. If the canal, or the whole of Egypt, were neutralized, a definite international position would be given to the passage, though, as we have seen, such neutralization would in all probability introduce new difficulties. Yet even if political complications were avoided for the future, the commercial difficulties, due to the privileged position of M. de Lesseps and his company, would still remain. On the other hand, if the company were dealt with in a satisfactory manner, the commercial troubles would vanish, but the political complications would be as threatening as ever. The plan I have proposed removes both, and thus affords a better chance than any other of future peace and security.

That there are theoretical deficiencies in it, no one sees more clearly than its author. It would be easy, for instance, to raise against it a number of academical objections based upon Mill and De Tocqueville. The

Principality of the Canal would not be a natural growth. Its people would have no history, no literature, no common religion and common tongue, no bond of blood, and little community of sentiments and interests. This is perfectly true; but it is also true that the conditions of Western life and thought, which make such ties essential to the success of a European state, do not exist in the territory through which the canal passes. Its population is a mixture of all races and all creeds. It has no bond of cohesion, and no political aspirations. All it desires is to be allowed to work the canal in peace and safety, and benefit by the trade which passes through the strip of territory on which it lives. Its feelings would not be outraged by placing it under a new Prince and a new Constitution. It cares no more for Egypt or Turkey than it does for Timbuctoo. It is the very subject for an experiment such as is proposed. For an artificial people an artificial government is suited. The population would be well content to be made the guardians of their one common interest—the canal. They would be quite capable of performing their duties in that respect, and under the guidance of a wise Prince would probably attain to no small measure of happiness and prosperity. The last report of our Consul at Suez shews conclusively that nothing but good government is needed to ensure the rapid development of that port; and what is true of it is true of the rest of the isthmus¹. The Principality would be weak, no doubt, from a military point of view, but it would be protected by the Great Powers. Its two neighbours, Egypt and Syria are weak also, and would be under no temptation to

¹ Parliamentary Papers, *Commercial*, No. 19 (1884).

attack it. Something must be done, and that soon. The plan I have sketched is put forward with great diffidence, but with the firm conviction that the present anomalous state of things cannot last much longer, and that unless there is sufficient statesmanship in Europe to substitute some tolerable sort of order for the existing chaos of undefined rights and conflicting interests, a long and disastrous war may at any moment break out.

ESSAY III.

THE PANAMA CANAL AND THE CLAYTON-BULWER TREATY.

PART I.

THE HISTORY OF THE TREATY.

LESS than half a century after the discovery of Central America the idea of connecting the Atlantic and Pacific Oceans by means of a canal seems to have been formed. Francisco Lopez de Gomara, the historian of the Indies, proposed in 1551 to pierce the continent from sea to sea a little to the north of the Isthmus of Darien, through what is now the territory of the Republic of Nicaragua. This remained the favourite route up to quite recent times. It was surveyed by Galisted in 1781, and again by Baily in 1838. But nothing came of these preliminary measures; and it was not till after the discovery of gold in California in 1847, and the acquisition of that country by the United States in 1848, that the vast importance of a rapid means of communication with the Pacific coast of North America was universally recognized. In 1849 a treaty was entered into between the United States and Nicaragua, whereby the government of the latter conceded to an American company the right of cutting a ship-canal from San Juan on the

Atlantic coast to the Pacific by way of the river San Juan and the lake of Nicaragua. At that time, however, Great Britain exercised a Protectorate over the Mosquito Indians, who occupied the territory through which the Atlantic end of the proposed canal would pass. The American Government therefore laid the project before Lord Palmerston, then Minister for Foreign Affairs in the Cabinet of Lord John Russell, and suggested that Great Britain should join with the United States in furthering the construction of the canal, and should take steps to remove the obstacle caused by the Mosquito Protectorate. Our Government declined to recognize the sovereignty of Nicaragua over the mouth of the river San Juan, which was in the territory of the protected Indians; but expressed itself most friendly to the scheme for uniting the two oceans. It was thought that the difficulty with regard to the conflicting claims of Nicaragua and the Mosquitos might be turned by means of a direct agreement between Great Britain and the United States; and under the influence of this idea negotiations were carried on vigorously at Washington by Sir Henry Bulwer, the British Minister, and Mr Clayton, the American Secretary of State. They resulted in the treaty of April 19, 1850, commonly called the Clayton-Bulwer Treaty, the object of which, so far as territorial rights were concerned, was "to exclude all question of the disputes between Nicaragua and the Mosquitos, but to settle in fact all that it was essential to settle with regard to these disputes as far as the ship communication between the Atlantic and Pacific, and the navigation of the river San Juan, were concerned¹."

¹ *Despatch of Sir H. Bulwer*, Feb. 3, 1850, quoted in *Parliamentary Paper, United States*, No. 5 (1882).

The preamble of the treaty declared that Great Britain and the United States desired to consolidate their friendship by "setting forth and fixing in a convention their views and intentions with reference to any means of communication by ship-canal, which may be constructed between the Atlantic and Pacific Oceans, by the way of the River San Juan de Nicaragua, and by either or both of the Lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean." By the first article each of the contracting parties bound itself never to exercise "any exclusive control over the said ship-canal." It was further agreed that neither would "ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America." Nor was either to make use of any protectorate or alliance, present or future, "for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying or colonizing Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, or of assuming or exercising dominion over the same." Lastly, neither was to attempt to gain for itself exclusive advantages in the matter of navigating the canal when made. The second article declared that, in the event of war between the contracting parties, vessels of both traversing the canal were to be exempt from blockade, detention or capture, and it was laid down that "this provision shall extend to such a distance from the two ends of the said canal as it may hereafter be found expedient to establish." The third article stipulated for the protection of the persons employed in making the canal. The fourth pledged the contracting

powers to use their influence with the local Governments to induce them to facilitate the construction of the canal, and to establish a free port at each end of it. By the fifth article the two powers "engage that when the said canal shall have been completed, they will protect it from interruption, seizure, or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said canal may be for ever open and free." This guarantee is however made conditional upon the absence of unfair discriminations, oppressive exactions, or unreasonable tolls on the part of the management. By the sixth article the contracting parties agree to invite other states "to enter into stipulations with them similar to those which they have entered into with each other." They also agree that "each shall enter into treaty stipulations with such of the Central American states as they may deem advisable, for the purpose of more effectually carrying out the great design of this convention, namely that of constructing and maintaining the said canal as a ship communication between the two oceans for the benefit of mankind on equal terms to all, and of protecting the same." Each of the two Governments covenants to use its good offices on behalf of the other in the negotiation of such treaties, if requested to do so; and both agree that in the case of any differences between the Central American states as to territorial rights over the soil through which the canal is to pass, they will assist in the settlement of such differences "in the manner best suited to promote the interests of the said canal." The seventh article provides that the contracting parties shall give their support to the first persons or company ready to make the canal with the consent of the local authorities, and in accordance with the principles set forth in

the convention ; and it goes on to say that if any such persons or company already have a satisfactory contract with any local state for the construction of the canal, such persons or company shall be allowed a year from the ratification of the convention to complete their arrangements, and only if they fail, shall the contracting powers afford their protection to any other persons or company.

This seventh article clearly refers to the American company which had obtained a Concession from the government of Nicaragua during the previous year : and indeed all the provisions of the treaty, so far as we have already given them, point unmistakably to the proposed Nicaraguan Canal, and to that alone. But inasmuch as by the time of which we are writing two other routes had been proposed, one through the Mexican province of Tehuantepec, and the other through the Isthmus of Panama, an eighth article was added to the treaty. It is this article which is now the most important of all, and with regard to the meaning of which so much controversy has lately arisen. It declares that "The Governments of Great Britain and the United States, having not only desired in entering into this convention to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection by treaty stipulations to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the inter-oceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama." The joint protection thus stipulated for is to be conditional upon the

approval by the two Governments of the charges and conditions of traffic, and upon the canals and railways being open to the subjects and citizens of both on equal terms, and also on like terms to the subjects of "every other state which is willing to grant such protection as Great Britain and the United States engage to afford."

Before we proceed to give an account of the difficulties which this treaty, and especially the last clause of it, has given rise to, it will be advisable to bring down to the present time the history of the various enterprises having for their object the construction of swift and easy means of communication between the two oceans.

The American company, whose concession from the Government of Nicaragua was the cause of the negotiations which ended in the Clayton-Bulwer Treaty, proceeded to take the necessary steps preliminary to the actual cutting of the canal. Surveys were made; and government engineers, both English and American, reported in favour of the scheme. In 1852 the assistance of a number of British capitalists was obtained; and the prospects of the undertaking appeared to be excellent. But the controversy which had already arisen between the two powers with regard to the territorial rights of Great Britain in Central America, and the consequent uncertainty as to whether the treaty would ever be carried out, had the effect of putting a stop to the further progress of the canal. The alarm and indignation caused by the attempts made upon the Central American States by lawless bands, organized within the territory of the Union, produced further complications; and after the defeat of the filibustering expedition of Walker against Nicaragua in 1855, the Government of that Republic revoked the concession

that had been granted to the company. Its steamers were seized, and its business being in consequence destroyed, it has lived ever since in a state of suspended animation. Thus the Nicaraguan Canal scheme failed; and though from time to time proposals for its revival have been put forward in the United States, as a sort of reply to other projects which find favour in Europe, no serious effort to carry them out was made till the close of President Arthur's administration, when a treaty was negotiated with Nicaragua for cutting a canal which should be under the joint ownership and control of the two powers. But when this treaty came before the Senate of the United States for ratification in February, 1885, it did not obtain the necessary majority; and in consequence the new scheme shared the fate of its predecessors.

On the other hand, a railway across the Isthmus of Darien at its narrowest point has been successfully built by an American company. The work was begun in 1850, and completed in 1855. It connects the ports of Aspinwall or Colon on the Atlantic and Panama on the Pacific; and its importance to commerce may be estimated from the fact that the value of the transit trade across it is calculated at £17,000,000 per annum¹. For thirty years it has worked without serious interruption; and there is no reason to suppose that any political complications are likely to interfere with its prosperity in the immediate future. The territory through which it runs belongs to Panama, one of the nine states which make up the Federal Republic of Colombia. Before 1861 these states bore the title of the United States of New Granada; and in 1846 their

¹ *The Statesman's Year Book for 1885*, p. 574.

Government negotiated a treaty with the great North American Republic, whereby its citizens were granted the same rights of free transit across the isthmus as their own; and in consideration of this the United States guaranteed the rights of sovereignty over the territory of Panama possessed by New Granada, and also the perfect neutrality of the isthmus. This treaty still holds good, the Colombia of to-day being the same state as the New Granada of 1846; and there cannot be the slightest doubt that under it the United States are bound to maintain against all other powers the territorial rights of the local Sovereign, whatever may be thought of their claim to have effectually neutralized the isthmus by their sole guarantee, and to have therefore rendered superfluous any agreement on the part of European powers to protect the Panama Canal which is now rapidly becoming an accomplished fact.

The mention of this canal brings us back to the schemes for establishing water communication between the two great oceans which wash the opposite shores of the American continent. The Mexican route through the province of Tehuantepec seems never to have been seriously attempted; but the extreme shortness of the Panama route, the distance from sea to sea being only about fifty miles, always caused it to be looked upon with considerable favour. At length it attracted the attention of the great French engineer, M. Ferdinand de Lesseps. In a green old age, after having successfully completed his great work of uniting the Red Sea and the Mediterranean, he cast his eyes upon the yet unpierced Isthmus of Darien, and sighing like Alexander for new worlds to conquer, proceeded with characteristic energy to form and push forward a plan for uniting the

Atlantic and Pacific Oceans. In 1878 a Congress of Engineers, held in Paris under his presidency, decided that a level canal without locks could be cut through the isthmus, following roughly the line of the Panama railway. It was estimated that the work would cost twenty-four millions, and a company was formed for carrying it out. The necessary Concessions were obtained, and in 1881 the great work was begun. It has since been pushed forward with all possible speed. Whole armies of labourers have been imported; towns and villages have been built for their accommodation; workshops, stores and ambulances have sprung up along the line of route, and such progress has been made with the cutting that M. de Lesseps calculates upon opening the canal in 1888. Less interested authorities are not so sanguine; but there can be no doubt that unless untoward events intervene a few more years will witness the successful completion of an enterprise more important commercially, if not politically, than the Suez Canal itself. It will shorten by thousands of miles the voyage from the Atlantic to the Pacific coasts of the United States. It will make a corresponding saving of distance in the sea journey from Europe to San Francisco and the other ports on the western shore of North and South America. China and Japan will find in it the highway by which their products will seek the richest markets. The colonists of Australia and New Zealand will be provided with an alternative route to their mother country. A fresh political importance will be given to Jamaica on the one side and the Sandwich Islands on the other; and a new and vigorous life will penetrate the indolent body politic of the Central American states. The possibilities of the future are so rich and so varied that even

the political imagination quails before them. It is enough to say that the successful completion of the Panama Canal will mark an epoch in the history of the world. There are not wanting prophets of evil, who declare that it will never be completed, or, if completed, will without fail be destroyed by some mighty convulsions of nature, such as are common in those volcanic regions. The works have already been twice wrecked by earthquakes in the columns of newspapers, but nevertheless they continue to prosper, the damage really done being speedily repaired. It is, of course, possible that the forces of nature may prevail over the skill and energy of man. But when we recollect how freely it was asserted that the difficulties in the way of making the Suez Canal were insuperable, and when we see how completely the event has falsified those gloomy predictions, we may, I think, find reason for looking forward with tolerable confidence to the piercing of the Isthmus of Panama. After all he has achieved in the course of his wonderful career, M. de Lesseps is hardly likely to stake his reputation at its close upon the issue of an enterprise doomed to certain failure.

We must now return to the Clayton-Bulwer Treaty, and endeavour to trace the vicissitudes of its troubled fortunes from its conclusion to the present time. When it was signed in 1850, the United States had no possessions of any sort in Central America ; but Great Britain exercised dominion over the island of Ruatan and other islands off the coast of Honduras, the whole group being known by the name of the Bay Islands. She also possessed the settlement of Belise, or British Honduras ; and she had, as we have seen, a Protectorate over the Indians of the Mosquito Coast. Attention was turned

in this direction in 1851 by an attempt on our part to organise the government of the Bay Islands. The United States objected to our proceedings, as being a breach of the convention of 1850; and contended that under its first article, which forbade either power to exercise dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, Great Britain ought to give up Ruatan and the Bay Islands, and to make arrangements satisfactory to them with regard to her Mosquito Protectorate. The British Government held that the treaty applied only to future acquisitions; and a dispute arose which lasted till 1860, and threatened at one time to seriously compromise the good relations between the two countries. No less than four methods of arriving at a settlement were tried, and three of them failed entirely. It was at first proposed to clear up the ambiguities of the original treaty by a supplementary convention. In 1856 Lord Clarendon and Mr Dallas succeeded in negotiating a treaty for the settlement of the questions at issue; but it was never ratified, owing to the inability of the two Governments to agree about some amendments and modifications which were insisted upon. Arbitration was then proposed; but the suggestion was not looked upon with much favour by the American Government, which put forward as a third course the abrogation of the treaty. When, however, it became clear that if the Clayton-Bulwer Treaty were torn up, Great Britain would insist upon reverting to the *status quo* before it was concluded, and would hold herself free to act as she pleased in Central America, the Cabinet of Washington elected to delay the consideration of the repeal project, till the result of the separate negotiations which the English Government was then conducting with the Central American states

should be known. This independent action on the part of Great Britain led at last to a solution of the difficulty which had threatened the very existence of the treaty. In 1857 Sir William Ouseley was sent on a mission to the Republics of Central America, with instructions to call at Washington on his way, and discuss matters with President Buchanan. Early in the following year he reached his destination, and encountered a series of adventures such as rarely fall to the lot of diplomatic envoys. To begin with, he had great difficulty in finding the Governments of those revolutionary regions, and when at last he discovered their whereabouts, and succeeded in getting interviews with them, he found it impossible to induce them to take any decisive steps. What with their real or pretended dread of the American filibusters, their high notions of the rights of their own countries, their monstrous claims on Great Britain, and their unaffected fear of being overthrown by their domestic rivals, the negotiations were spun out to an enormous length. To add to Sir William Ouseley's troubles he fell ill of some of the fevers of the country, and had also to endure the annoyance of receiving unmistakable reprimands, first from Lord Malmesbury, and afterwards from Lord John Russell, who held in succession the seals of the Foreign Office during the period of his mission. At last after nearly two years he was relieved by Mr Wyke, who soon shewed that he understood better than his predecessor the ways of Central American politicians¹. In 1859 a treaty was concluded with Guatemala for the settlement of the boundaries of Belise or British Honduras; and in the same year Great Britain

¹ The story of the missions of Sir W. Ouseley and Mr Wyke may be extracted from the Blue Book on Central American affairs issued in 1860.

agreed to give up Ruatan and the Bay Islands to the Republic of Honduras. Her claims with regard to the Mosquito Coast concerned Nicaragua as well as Honduras. With the latter power an agreement was come to in November, 1859, and with the former in January, 1860. The Protectorate over the Indians was withdrawn in consideration of certain stipulations in their favour made by the states in whose territory they lived, and all other matters were amicably adjusted. In 1860 copies of the treaties with Guatemala, Honduras, and Nicaragua, were officially communicated to the American Government, by whom they were received with such great satisfaction that President Buchanan in his annual message to Congress said, "The discordant constructions of the Clayton-Bulwer Treaty between the two Governments, which at different periods of the discussion bore a threatening aspect, have resulted in a final settlement entirely satisfactory to this Government."

It should be noted that throughout this long and intricate discussion, no doubt whatever was expressed on either side as to the meaning and binding force of those provisions of the treaty, which stipulated for the neutrality of the means of communication between the Atlantic and Pacific Oceans, and their freedom from the exclusive control of any one Government. The controversy turned simply and solely upon the question whether Great Britain was bound by the treaty to abandon the territories she already held in Central America, and thus put herself in exactly the same position as the United States, who had no possessions in that region. In the end Great Britain gave way on almost every point, and the President of the United States declared that the questions in dispute had been "amicably and honourably

adjusted¹." In view of the position assumed by the recent Administration of President Arthur, it is needful to point out clearly that in 1860 the United States claimed no exclusive control of the inter-oceanic routes, but all their activity was directed towards dislodging Great Britain from certain points of vantage, which they held would have enabled her to exercise such a control. Having done this, they were perfectly satisfied with the treaty, and with their own position under it.

As a further proof that both the contracting parties were content to abide by the provisions of the treaty when the territorial disputes were settled, we may mention the fact that each of them negotiated from time to time with other powers, in order to secure freedom of passage across the isthmus for the commerce of all nations, both in peace and war. Great Britain led the way by her treaty with Honduras in 1856. In this instrument she guaranteed "positively and efficaciously the entire neutrality" of a projected inter-oceanic railway through the territory of that Republic, on condition that it should be at all times free to her subjects for all lawful purposes, without oppressive exactions or discriminating tolls : but as the railway was never made, the rights and obligations contemplated by the treaty did not come into existence. Our treaty of February, 1860, with Nicaragua contained similar provisions, as did also that negotiated between the United States and Honduras in 1864, and that between the same power and Nicaragua in 1867. The latter instrument not only pledged the American Government to guarantee the neutrality of all Nicaraguan routes between the Atlantic and Pacific Oceans, but also bound

¹ Message of President Buchanan, Dec. 3, 1860.

it to use its influence with other nations to induce them to join in the guarantee. We see, therefore, that both the parties to the Clayton-Bulwer Treaty regarded its stipulations with respect to the neutrality of the inter-oceanic routes, and their freedom from the predominating influence of any power, as part of their national policy, and that they were anxious to associate other powers with themselves in their guarantee. The main principle of the treaty met with no opposition or criticism. What difficulties there were arose with regard to subordinate points, and they were happily settled in 1859 and 1860.

So matters stood till the vigorous initiative of M. de Lesseps again brought the project of piercing the Isthmus of Panama within the region of practical politics. The appearance upon the scenes of a French engineer at the head of a French company was not looked upon with much favour by the United States, where an opinion had been for some time prevalent, that the construction of a canal by other means than American skill and capital, would in time lead to the extension of the political system of Europe to the continent of America, and thus conflict with the doctrine laid down by President Monroe in 1823, that the United States would regard any such extension as dangerous to their peace and happiness, and would therefore be unable to tolerate it. Had the American Government decided to act upon this principle in its fullest sense, they would have been obliged to prohibit by threat of war the enterprise of M. de Lesseps. They did not, however, proceed to any such extremity; but instead they caused it to be known that, on the completion of the canal, they would claim a preponderating influence over it. A definite and official statement of this new

policy is to be found in the inaugural address of President Garfield, delivered at Washington on the 4th of March, 1881. Speaking of the construction of ship-canals or railways across the Isthmus of Panama, he said "The subject, however, is one which will immediately engage the attention of the Government, with a view to the thorough protection of American interests. We will urge no narrow policy, nor seek peculiar or exclusive privileges in any commercial route; but, in the language of my predecessor, I believe it to be the right and duty of the United States to assert and maintain such supervision over any inter-oceanic canal across the isthmus that connects North and South America as will protect our national interests." It is perhaps possible to construe this declaration in a sense not incompatible with the engagements of the Clayton-Bulwer Treaty; but the same cannot be said of a despatch issued on June 24, 1881, by Mr Blaine, the Secretary of State in the Cabinet of the new President. In that document he intimated that the Government of the United States could not permit the European powers to guarantee the neutrality of the Panama Canal, which was, he argued, sufficiently secured by the American treaty with New Granada in 1846. He intimated that any movement in the sense of supplementing the guarantee contained therein would be regarded as an "uncalled-for intrusion into a field where the local and general interests of the United States of America must be considered before those of any other power." And he based these exclusive claims upon the fact that the canal, when made, would be the great highway between the Atlantic and Pacific States of the Union, and that it would thus perform a "domestic function" for the

United States, and be "substantially a part of their coast line."

There is certainly no internal evidence in this despatch that Mr Blaine, when he wrote it, remembered the provisions of the Clayton-Bulwer Treaty; and it may be charitably supposed that he had forgotten their existence. He, however, soon received a reminder, in the shape of a courteous declaration from Earl Granville, "that the position of Great Britain and the United States with reference to the canal, irrespective of the magnitude of the commercial relations of the former power with countries to and from which, if completed, it will form the highway, is determined by the engagements entered into by them respectively in the convention which was signed at Washington on the 19th of April, 1850, commonly known as the Clayton-Bulwer Treaty; and Her Majesty's Government rely with confidence upon the observance of all the engagements of that treaty¹."

Meanwhile Mr Blaine seems to have discovered the Clayton-Bulwer Treaty for himself; and accordingly a few days before he received Earl Granville's declaration, he wrote another despatch, in which he discussed its provisions at length. He pointed out the objections there were to them in the opinion of his Government, and proposed certain modifications, the effect of which would be to free the United States from the obligation not to fortify and control the canal, and to allow them to acquire military and naval stations for the purpose of commanding it, while at the same time Great Britain remained bound not to obtain any cessions of territory

¹ Earl Granville to Mr Hoppin, Nov. 10, 1881. *United States*, No. 2 (1882).

in Central America. It is obvious that such one-sided propositions could not be accepted by Her Majesty's Government; and accordingly we find that Lord Granville rejected them in a despatch dated January 7, 1882, and suggested instead that all maritime states should be invited "to participate in an agreement based on the stipulations of the Convention of 1850." Then followed the diplomatic controversy we are about to review; but from December, 1882, when the last despatch was written, the matter slumbered till December, 1884, when the world was startled by the publication of a treaty which had just been negotiated between the United States and the Republic of Nicaragua. By it the former power agreed to provide the capital for the construction of a ship-canal through the territory of the latter. In return it was to hold in joint sovereignty with Nicaragua the slip of land through which the canal passed, to obtain favourable terms for its coasting trade, and to have two-thirds of the revenue arising from the traffic. We have seen that the Clayton-Bulwer Treaty forbade the United States "to exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America," or to erect any fortifications therein, and bound them to arrange with Great Britain for the joint protection of any oceanic canal that might be made in those regions on condition that it was "open to the subjects and citizens of both on equal terms." It is obvious that these provisions were entirely set at naught by the Nicaraguan treaty. Indeed its authors did not attempt to disguise so evident a fact; but they justified their conduct by asserting that the Convention of 1850 had been destroyed by the action of Great Britain, and consequently the United States were no

longer bound by it. The validity of this contention will be discussed in the following pages. It did not commend itself to those American senators whose votes caused the rejection of the treaty.

PART II.

THE CONTROVERSY WITH THE UNITED STATES.

The foregoing historical account has put us in a position to understand the views enunciated by the parties to the Clayton-Bulwer Treaty in the recent controversy between them. England desired to retain the general principles on which that instrument is based, and to apply them to the new circumstances which have arisen in consequence of the successful operations of M. de Lesseps. America, on the other hand, wished to carry out a policy quite opposed to that which is enunciated in the treaty, and therefore endeavoured to minimise inconvenient obligations, and get rid of even the appearance of being bound by stipulations inconsistent with her new departure. Under these circumstances it is not to be wondered at that an earnest, though friendly controversy was carried on between the two states, Earl Granville being the mouthpiece of England, and first Mr Blaine, and then his successor, Mr Frelinghuysen, speaking on behalf of the United States. Throughout the dispute Great Britain occupied a defensive position, taking her stand upon the letter and spirit of former engagements, while the statesmen of America laboured to shew that their country can no longer be held bound by the full terms of the Convention of 1850.

In order to establish this contention they resorted to

two different lines of argument, each of which must be considered by itself. There was first the argument from history and from the terms of the treaty, and this was relied on to shew that it is for all practical purposes a lapsed agreement. This line found most favour with Mr Frelinghuysen, and was followed out in the lengthy despatch of May 8th, 1882, which is his only contribution to the controversy¹. Then there was the argument from the nature of the case, put forth by Mr Blaine in 1881, with the object of shewing that circumstances have so greatly altered since 1850, as far as the United States are concerned, that they can no longer be expected to hold themselves bound by the agreements embodied in the treaty. We will discuss these positions in the order in which they have been stated, using more freedom than was possible for a Minister of the Crown, bound by all the trammels of diplomatic etiquette, and laudably anxious not to endanger the good feeling which happily exists between the two great political divisions of the English-speaking people.

Mr Frelinghuysen refers to the indisputable fact that the first article of the Clayton-Bulwer Treaty pledges the contracting parties not to "occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America." He points out that Great Britain exercises dominion over Belise or British Honduras, and remarks that "such dominion seems to be inconsistent with that provision of the treaty which prohibits the exercise of dominion by Great Britain over any part of Central America." He further declares that at the time

¹ Mr Frelinghuysen to Mr Lowell, *United States*. No. 5 (1882.)

the treaty of 1850 was signed, the British had merely the privileges of cutting wood and establishing saw mills in the territory in question, the sovereignty over it being vested in the Republic of Guatemala, as successor to the rights of Spain in those regions. In 1859, however, by treaty with Guatemala, what was previously a 'settlement' was transformed into a 'possession,' a boundary line was to be defined by mutual agreement or arbitration, and all within it was recognized as British territory. Mr Frelinghuysen asserts that the United States have never consented to this development of British authority, and argues that, since the treaty of 1850 prohibits the exercise of dominion in Central America by either of the contracting parties, "if Great Britain has violated and continues to violate that provision, the treaty is, of course, voidable at the pleasure of the United States."

I doubt whether it is so perfectly clear as Mr Frelinghuysen imagined that the infraction of a treaty in any one point justifies its denunciation *in toto*. A great deal surely depends upon the importance of the provision violated, and the relation in which it stands to the main object of the treaty. But even if we grant the American contention as to principle, we are under no obligation to admit the conclusion that the United States are free to declare the Clayton-Bulwer Treaty no longer binding upon them. It may be quite true that if Great Britain has violated it, they can escape from its obligations at their pleasure: but what if Great Britain has not violated it? What if, by the admission of American negotiators, her conduct in the matter of Belise has been from beginning to end in strict accordance with it? What if the asserted increase of authority is a figment based upon a change of terms of description? What if the United

States has recognized and adopted that change? Now I am prepared to shew that every one of these hypotheses is true; and with the establishment of their truth this portion of the American case collapses absolutely and completely.

We have already seen that in the course of the ten years which followed the signing of the Clayton-Bulwer Treaty, grave difficulties arose between the signatory powers with regard to the construction of its first clause; and we have traced their history up to the time of their final settlement in 1860. These difficulties were connected with the question of the British sovereignty over the Bay Islands, and the British Protectorate of the Mosquito Indians. The question of Belise, which Mr Frelinghuysen brings forward as an instance of British violation of the treaty, was from the beginning regarded as outside its operation. A few days before it was ratified, Sir Henry Bulwer handed to Mr Clayton a declaration, to the effect that Her Majesty's Government did not understand the engagements of the convention to apply to the settlement at Honduras, or to its dependencies; and on the day that the ratifications were exchanged Mr Clayton in replying used the words, "To this settlement and these islands (the dependencies alluded to) the treaty we negotiated was not intended by either of us to apply." In the face of these facts all Mr Frelinghuysen can find to say is, that the British declaration was not made to, or accepted by, the President and Senate of the United States. That is perfectly true, and if at the time they had thrown their negotiator overboard, and declared that they did consider Belise as subject to the provisions of the treaty, no one in England would have had any reason to accuse them of bad faith,

however general might have been the regret that the curse of ambiguous phraseology, which seems to brood over all negotiations between Great Britain and the United States, had been fatal to another attempt at the conclusion of a beneficial agreement¹. But they made no demur. They accepted in silence the construction put upon the treaty by their representative, and that construction remained unchallenged for thirty-two years. Surely after the lapse of so long a period it was too late to argue that Mr Clayton's words had no authority, and that the true sense of the treaty is the very opposite of that which its negotiators solemnly declared they intended it to bear.

But this is not all. Not only have the United States never till lately disputed the British contention that Belise is outside the treaty; they have even expressly accepted and acted upon it. For in the course of the long negotiations arising out of the divergent views of the two Governments as to the nature and extent of the reciprocal obligations not to exercise dominion in Central America, General Cass, the Secretary of State in President Buchanan's Cabinet, declared in July, 1858, to Lord Napier, the British Minister at Washington, that "if the Bay Islands were frankly transferred to Honduras in full sovereignty, and if the Mosquito Protectorate were abandoned,...it is not probable that the Government of the United States would make a difficulty about the frontier of British Honduras²." And further, when the same American statesman received from Lord Lyons in August, 1859, an account of the treaty negotiated with

¹ The question, such as it was, depended entirely upon the meaning to be attached to the words 'Central America.'

² Lord Napier to Lord Malmesbury, July 28, 1858.

Guatemala in the previous spring for the settlement of the boundaries of British Honduras, he declared it was "just what he expected, and was completely satisfactory."¹ This treaty was one of the three submitted to President Buchanan in 1860, and received by him with such cordial approval that he made, in his annual message of that year, the declaration already quoted², to the effect that a most satisfactory settlement of all the Central American difficulties had been reached. Mr Frelinghuysen asserts that the President referred only to the adjustment of the Mosquito Protectorate question; but he offers no proof of this statement, and indeed no proof is possible. Mr Buchanan's declaration was as general as words could make it. He had before him the treaty with Guatemala, which dealt with the boundary of Belise, as well as the treaties with Honduras and Nicaragua, which dealt with the Mosquito Indians and their territory. If he had regarded the continued existence of the sovereign rights of Her Majesty over British Honduras as a breach of the Clayton-Bulwer Treaty, he would never have declared that the controversy as to the construction of that document was "amicably and honourably adjusted." He had fought with the utmost tenacity all through his term of office for what he regarded as the rights of America under the first article of the treaty, and it was not likely that at the close of his administration he would tamely surrender an important point. In fact all through the negotiations it had been recognized that Great Britain's position in Honduras was not affected by the treaty at all. The utmost ever claimed by the American negotiators was that the British frontier there

¹ Lord Lyons to Lord John Russell, Aug. 2, 1859.

² *Ibid.*, p. 101.

should be defined. They never asserted that the existence of British authority was a breach of the treaty, though they made such a claim again and again with regard to the Bay Islands and the Mosquito territory. It was reserved for Mr Frelinghuysen, twenty-two years after the termination of the controversy, to discover a reason for repudiating the convention in a course of action which his predecessors had emphatically approved.

It is obvious that if the exercise of British dominion over Belise is a circumstance entirely outside the operation of the Clayton-Bulwer Treaty, the question of the exact nature and limits of the authority set up has no bearing upon the matters in dispute between the two Governments. Yet, inasmuch as Mr Frelinghuysen ekes out his main argument on this head by a number of assertions as to a conversion of the British 'settlement' in Central America under Spanish-American sovereignty into a British 'possession' with British sovereignty, to which conversion the United States, according to him, have never given their assent, it may be advisable to shew that nothing more took place with regard to Belise than a change in the terms of description applied to it, and that this change has been recognized and adopted by the United States.

The English settlements in Belise were first made from Jamaica in the seventeenth century. The Spaniards, however, claimed dominion over the territory occupied by our colonists, and in 1756, and again in 1759, succeeded in expelling them. But, by the Peace of Versailles in 1783, England gained for her settlers the right of cutting wood in Spanish Honduras, in return for the restoration of the Floridas, which had been ceded to her by Spain in 1762. In a few years war again broke out between

the two powers; and in 1798 a Spanish force attacked the English settlements, but was defeated and driven off. Thus a right analogous to the right of conquest was established on behalf of Great Britain; and as, neither in the treaty of Amiens nor in any subsequent treaty, are there to be found stipulations for the retrocession of Belise to Spain, it is clear that the statesmen of Madrid have tacitly renounced all claim on the district in question. When the revolutions of the early years of the present century established the independence of the transatlantic colonies of Spain, they succeeded, of course, to the territorial rights of the mother country, but to no greater rights. The Spanish dominion over Belise having vanished before the revolution owing to the fortunes of war, it is plain that the Republic of Guatemala never had any rights of sovereignty in that territory. It had, however, a reasonable claim for a definite frontier; and the treaty of 1859 was negotiated for the purpose of fixing a boundary satisfactory to both parties. The question at issue was not the existence of sovereign rights on the part of Great Britain, but the extent of territory over which they could be exercised. The Spanish sovereignty, which Mr Frelinghuysen disinterred for the purpose of shewing that Great Britain has violated the Clayton-Bulwer Treaty, was destroyed in 1798, fifty-two years before the treaty was signed! And even if his allegation, that we have since 1850 changed a settlement under Spanish-American sovereignty into a colony under the sovereignty of the Queen, were true, American diplomatists would have no right to take advantage of the alteration; for the United States have themselves adopted the new phraseology on which this portentous charge is based. Mr Frelinghuysen declares

that they have never given their assent to the change. Earl Granville, in his despatch of December 30, 1882, disproves this assertion by quoting the preamble of a Postal Convention made between the two countries in 1869, in which document "an exchange of mails between the United States on the one side, and the *Colony* of British Honduras on the other" is provided for. The Convention was duly signed by the representative of America, and approved by President Grant, who certainly was not addicted to the surrender of his country's rights, either directly or by inference.

Having disposed of the historical branch of Mr Frelinghuysen's argument, we must now turn to the consideration of the contentions which he bases upon the wording of the treaty. Mr Blaine had hinted in his despatch of November 29, 1881, that something might be made of the fact that the Nicaraguan scheme, to which the main stipulations applied, had never been carried into effect; but he had preferred to rely upon the plea that the altered circumstances of the time, and the existence of an American guarantee of the neutrality of the Isthmus of Panama under the treaty of 1846 with New Granada, rendered necessary a revision of the Clayton-Bulwer Convention. His successor in office lays comparatively little stress upon the argument from the nature of the case, though he uses it from time to time to strengthen his other contentions; but he elaborates at great length the position, that most of the provisions of the treaty are now extinct, and that the remainder are so dependent upon those which have lapsed that the United States is under no obligation to carry them out. We shall, I think, find on examination

that this second branch of his argument has little more to recommend it than the first.

The stipulations of the Clayton-Bulwer Treaty may be roughly divided into three classes. We have first those which deal with the renunciation of dominion in the Central American territories. These have already been considered, and we shall not need to refer to them again. Secondly, there are those which apply to the Nicaraguan Canal, which it was then supposed would be made within a few years. These, it may be at once admitted, have become obsolete as regards that particular canal, because it has not been constructed. And finally there are those which refer to the protection by the contracting parties of any canals and railways which may be made in the future across the Isthmus of Darien. It is these last which were found so distasteful by President Arthur's Administration, as soon as the enterprise of M. de Lesseps had made a Panama Canal one of the probabilities of the near future. They are embodied in the eighth article of the treaty; and they bind the contracting parties "to extend their protection by treaty stipulations to any other practical communications, whether by canal or railway, across the isthmus which unites North and South America, and especially to the interoceanic communications, should the same prove to be practicable, which are now proposed to be established by way of Tehuantepec or Panama." With these words before him Mr Frelinghuysen argued that "article viii. of the Clayton-Bulwer Treaty relates only to those projects *now* (1850) proposed to be established." It was pointed out in reply that the article refers in express terms to *any communications* other than those mentioned in the former part of the treaty; and certainly the most

cursory perusal of it shews the conclusiveness of the rejoinder.

But in justice to Mr Frelinghuysen it must be admitted that some of his arguments on this branch of the subject are characterized by considerable subtlety. If I understand him aright, he contends that the eighth article of the treaty was assented to by the United States in order to secure the speedy construction of a canal under the Nicaraguan Concession of 1849, they being at the time too poor in floating capital to make it by their own unaided efforts, and that accordingly, since the canal has never been made, the obligations which they entered into in order to get English assistance in making it are no longer binding upon them. I admit that he does not say this in so many words; but it seems to me that no other conclusion can be drawn from the sentence, "It was to secure the construction of a canal under the grant of 1849 from Nicaragua that the United States consented to waive the exclusive and valuable rights that had been given to them; that they consented to agree with Great Britain that they would not occupy, fortify, colonize, or assume dominion over any part of Central America; and that they consented to admit Her Majesty's Government at some future day to a share in the protection which they have exercised over the Isthmus of Panama"—followed, as these words are, after a short interval by the declaration that, since the Nicaraguan Canal has not been made by the company alluded to in the treaty "the United States esteem themselves competent to refuse to afford their protection jointly with Great Britain to any other person or company."

We may reply that, if the general stipulations for

protecting any future interoceanic routes had been regarded by the American negotiators as a concession granted to Great Britain in order to obtain from her special stipulations in favour of the contemplated Nicaraguan Canal, they would have taken care that the treaty should say so. It would have been easy to insert words to the effect that, if the canal through the territory of Nicaragua was made and guaranteed, as provided in the treaty, then, but not otherwise, the high Contracting Powers would in the same way guarantee any future canal that might be made by any other route. But nothing of the kind was done; and indeed the words of the treaty, in so far as they bear upon the point in dispute at all, seem to imply that the two sets of obligations—those relating to the canal then contemplated, and those relating to future canals or railways—had no mutual interdependence, but were quite separate from one another. The first seven articles deal with the proposed canal through Nicaraguan territory. The eighth article declares that since the two Governments have “not only desired in entering into this convention to accomplish a particular object, but also to establish a general principle,” they will extend their protection by treaty stipulations to any future canals or railways that may be made across the isthmus. The inference to be drawn most naturally from these words is, that the contracting powers wanted to do two things, the first being to guarantee the neutrality of a canal which they expected would soon be made, the second being to apply the same principle of neutrality to a number of canals and railways about the making of which they were more or less doubtful. Inasmuch as these latter might never exist, they did not elaborate with regard to them a

scheme of neutralization, such as they had applied to the former, but contented themselves with stipulating that, if they came into existence, a treaty providing for their protection should be made. There is nothing whatever to shew that the "general principle" was dependent for its future application upon the carrying out of the "particular object"; but on the contrary the whole tenour of the treaty justifies the supposition that the two powers saw such manifest advantages in neutralization, that they were not content to provide for its application to the project then before them, but were determined to pledge themselves to the principle in reference to all future projects of the same kind, leaving the details to be worked out as occasions offered.

And this conclusion, which naturally arises from reading the treaty, is borne out by the history of the negotiations that took place with regard to it. Again and again American statesmen declared, while engaged in their endeavours to expel British dominion from the neighbourhood of the isthmus, that all they desired was "the security and neutrality of the interoceanic routes¹." They contended that the British Sovereignty over the Bay Islands and Protectorate of the Mosquito Indians would enable England to exercise a control over these routes inconsistent with their complete neutralization. But they never, even when the controversy threatened to end in a rupture, argued that they were free to do as they pleased in Central America, because the original scheme for a Nicaraguan Canal had fallen through. The fatal blow was given to that project by Walker's filibustering expedition in 1855; and yet, in the interval

¹ General Cass to Lord Napier, Nov. 8, 1858.

between that year and 1860, not only was the treaty regarded as being in full operation by the Cabinet of Washington, but long and intricate negotiations were carried on in order to keep it in being, and President Buchanan expressed great satisfaction at their successful issue. Mr Frelinghuysen seems to have imagined that his own jealousy of an international guarantee of the isthmian routes was shared by the statesmen who negotiated the Clayton-Bulwer Treaty, whereas they welcomed the prospect of obtaining it. He represents them as driven by hard necessity to accept the distasteful co-operation of England in guarding the proposed canals, whereas they were delighted to receive it. He divides the treaty into two parts, one of which he asserts without the slightest authority was the consideration given by the United States in order to obtain the other, whereas both parts were willingly accepted by them as separate and independent stipulations. And all this he does in order to defeat a claim on the part of Great Britain to do that which his predecessors were most anxious she should do, and to avoid the application to the Isthmus of Panama of the principle which they repeatedly asserted was the main object of their policy in that region. So extraordinary a change of front has rarely been executed in the whole course of diplomatic history. It is not altogether inexplicable; but the reasons which account for though they do not justify it, will come forward for consideration more naturally when we deal with the arguments of Mr Blaine.

We have now to deal with the suggestion that, since the eighth article of the Convention of 1850 contemplates some future treaty stipulations in favour of the Panama route, and no such stipulations have been made, the

United States are relieved by lapse of time from the obligation to accept a proposal from Great Britain for a joint guarantee. Mr Frelinghuysen takes up this position and endeavours to strengthen it by referring to the American guarantee of the neutrality of the isthmus contained in the treaty of 1846. If, he argues, Great Britain has concurred for thirty-two years in the protection of the Panama route by the United States under their treaty with New Granada, why does she now come forward, and assert a right, rendered obsolete by circumstances, to guarantee that route herself? To this it may be replied that an agreement to take joint action at a period in the future purposely left indefinite, is exactly the kind of agreement which is not destroyed by lapse of time. If a man and a woman agree to marry without fixing any particular date, the law expects that agreement to be kept, and gives either party a right to bring an action against the other in case of a refusal to do so. There are no tribunals to enforce the performance of contracts entered into between nations; but all the more on that account are they bound in honour to fulfil their engagements. As Earl Granville points out, article viii. of the Clayton-Bulwer Treaty "is none the less an agreement because its application to any canal thereafter made is to be carried into effect by treaty stipulations¹." No doubt it contemplates the making of future provisions; and we may willingly grant to Mr Frelinghuysen that these provisions must be just and beneficial, and that Columbia, as the territorial power on the isthmus, and the United States, as a guarantor of the neutrality of the isthmus as well as a

¹ Earl Granville to Mr West, Dec. 30, 1882.

signatory of the Clayton-Bulwer Treaty, have a right to be consulted in drawing them up. All we contend for is that the latter power has no right to decline altogether our co-operation in the matter. It is pledged to act with us by the engagement of 1850.

England has not pressed for the conclusion of a treaty of guarantee before, because till lately circumstances did not demand action. There has been, it is true, a railway across the isthmus since 1855; but its political importance is infinitely less than that of a canal. As long as trains ran regularly and commerce was not interrupted, there was no need to place it under a formal guarantee of neutrality. It did not alter the political geography of half the globe, and create by the mere fact of its existence problems calculated to tax to the utmost the skill and forbearance of the statesmen of two continents. Moreover the opportunity was not forthcoming, even had the need for neutralization existed. For five years after the opening of the railway Great Britain and the United States were engaged in a dispute as to the interpretation of the treaty which provided for its eventual protection by their joint guarantee. It would have been supremely foolish to propose the making of a new agreement, when it was doubtful whether the old one would not be destroyed. As soon as the difficulty was removed, all the energies of the American people were concentrated on their great civil war; and after peace was restored, there was much irritation against England on account of her alleged breaches of neutrality in the matter of the Confederate cruisers. The settlement of this question by the Geneva Arbitration in 1872, made the relations between the two countries more friendly than they had ever been before; and

rendered it possible for the first time since the opening of the Panama Railway, to discuss in a friendly manner the question of its neutralization. But statesmen do not go out of their way to find subjects for negotiation. Nothing occurred to bring the question of transit across the isthmus prominently forward, till M. de Lesseps commenced his operations. Soon afterwards the plan of neutralizing his canal by an international guarantee was mooted; and on the interposition of the United States with something very like a veto, Great Britain took her stand upon the eighth article of the treaty of 1850, and the present controversy began. As soon as her rights were challenged, she maintained them; but she did not seek to put them forward when there was no special need for her to do so.

There is, therefore, little force in the naked statement that the United States are relieved by lapse of time from their obligation to accept the assistance of Great Britain in protecting the Panama Canal. Nor is the argument much strengthened when reference is made to the treaty of 1846 with New Granada, and it is contended that our concurrence in the protection of the Panama route by the United States under its thirty-eighth article, deprives us of the rights of joint protection we have stipulated for in the Clayton-Bulwer Treaty. For, in the first place, it is an admitted doctrine of International Law that should two engagements be irreconcilable the more recent must prevail; and consequently the agreement of 1850, and not that of 1846, binds the United States, if it be true that they cannot both be acted upon. And, in the second place, it is abundantly clear that there is no incompatibility between the two sets of stipulations. By the treaty with

New Granada "the United States guarantee positively and efficaciously...the perfect neutrality of the before-mentioned isthmus." By the treaty with Great Britain the two powers "agree to extend their protection by treaty stipulations" to any future canal or railway across the isthmus. In the first, the neutrality of a whole territory is guaranteed by the United States alone. In the second, the protection of a particular route or routes through that territory is contemplated as the joint work of Great Britain and the United States. The two things are perfectly consistent with one another. As Earl Granville says in his reply to Mr Frelinghuysen, "there is nothing in the terms of the treaty of 1846 which confers on the United States any exclusive right of protection, or which is inconsistent with the joint protection of Great Britain and the United States¹." The notion of an exclusive right is opposed to the facts of the case, and the words of the documents. Moreover it is a doctrine which, as we have seen, never entered into the minds of the American statesmen who fought the great controversy with England as to the meaning of the Clayton-Bulwer Treaty. Again and again they repudiated the idea of vesting exclusive control in any single power. What they wanted, and what they contended the treaty provided for, was "the neutrality of the interoceanic routes, and their freedom from the superior and controlling influence of any one Government²." These are the words of General Cass written in 1858. They certainly cannot be reconciled with recent claims.

We have now gone through the arguments from

¹ Earl Granville to Mr West, Dec. 30, 1882. *United States*, No. 5 (1882).

² General Cass to Lord Napier, Nov. 8, 1858.

history and from the terms of the treaty, which form the staple of Mr Frelinghuysen's contentions. He does not confine himself to them; but introduces a number of considerations drawn from the nature of the case. These latter are, however, little more than faint echoes of the more outspoken declarations of Mr Blaine; and as they will be dealt with fully when we come to examine his despatches, it will not be necessary to give them separate consideration in their less pronounced form. But inasmuch as Mr Frelinghuysen sets forth at some length his views of the Monroe Doctrine, it may be advisable to remark in passing that a mere statement of policy, made by the head of the executive of the United States, cannot override the international obligations solemnly entered into by the American Government. I shall have soon to shew that the apprehensions of European interference in the internal affairs of the American continent, in consequence of an international guarantee of the neutrality of the Panama Canal, are exaggerated and groundless alarms; and that such a guarantee is not contrary to any reasonable construction of the Monroe Doctrine. Here it is sufficient to point out that a state is bound to fulfil the duties laid upon it by International Law, in spite of any difficulties that may be caused by its internal constitution. During their own civil war the United States very properly held England to the fulfilment of what they declared were her international obligations under the law of neutrality, though she pleaded that her municipal law did not arm her executive with sufficient power to prevent the acts complained of. In the same way England has every right to hold the United States to the fulfilment of their obligations under the Clayton-Bulwer Treaty, though

they plead that their Monroe Doctrine forbids them by implication to accept the stipulated guarantee.

It is necessary now to consider the argument that owing to the change of circumstances since 1850 the United States are no longer bound by the convention of that year. This is the bold assertion of Mr Blaine. In one of the most remarkable state papers ever penned¹, he proved to his own satisfaction that the conditions under which the treaty was made were temporary in their nature, have long ceased to exist, and can never be reproduced. He subjected its provisions to an unsparing analysis, with a view to shew that they involved a virtual surrender of the canal to the control of Great Britain, and militated against the claim of the United States to priority on the American continent. Having thus heaped together in his indictment a number of most formidable counts, he proceeded to give notice that his Government would not consent to perpetuate the treaty as it stood, but required some essential modifications to be made in it. He justified his proposals on this head by a reference to the case of Great Britain, of whose military and naval establishments along the route to India he gave a highly coloured sketch. He then discussed the utility of neutralization, and demonstrated that it amounted to less than nothing, unless it was effected by the United States, and by the United States alone. Finally he set forth the changes he deemed necessary in the treaty; and it is not surprising to find that they involved the complete reversal of the principles embodied in it, and the practical annexation of the canal to the territory of the Union. As an inte-

¹ Mr Blaine to Mr Lowell, Nov. 19, 1881. *United States*, No. 1 (1882).

resting supplement to these views, we were assured that they started no new policy, but were nothing more than a pronounced adherence on the part of the United States to doctrines long ago enunciated by the highest authority in their Government.

There cannot be the slightest doubt that Mr Blaine made in perfect good faith the marvellous series of assertions we have just recapitulated, and that he was animated throughout by the most friendly feeling towards England. There is none of the carping, fault-finding spirit in his despatches. A tone of courteous respect runs through them. They are the work of a strong man, so entirely possessed by an idea that he cannot for a moment conceive that others should not see the matter just as he sees it. Probably, if his inmost thoughts could be known, he considers Earl Granville a very stupid person, for not perceiving that it is the manifest destiny of the United States to be supreme on the American continent, and that no inconvenient stipulations or unaccommodating principles ought to be allowed to stand in the way of the fulfilment thereof. He is simply unable to understand how it is possible that European Governments can have any rights in American matters against his country. With regard to this Panama question, he flatly tells Great Britain that "it is the fixed purpose of the United States to confine it strictly and solely as an American question, to be dealt with and decided by the American Government¹." But he never dreams that this declaration can give offence. It is true we have a treaty right to a voice in the settlement of the legal position of the canal. But it conflicts

¹ Mr Blaine to Mr Lowell, Nov. 19, 1881.

with the claims of the United States, and therefore it must be set aside. Nothing surely could be more natural, nothing less calculated to provoke a breach! Nay, rather, it is a healing measure, a special evidence of good will! "I am sure," says Mr Blaine, "Her Majesty's Government will find in the views now suggested, and the propositions now submitted, additional evidence of the desire of this Government to remove all possible grounds of controversy between two nations, which have so many interests in common, and so many reasons for honourable and lasting peace."

It is an invidious task to have to dispel these pleasant hallucinations, and to subject to the test of reason and authority the novel views that came so trippingly from the pen of Mr Blaine. Yet it is necessary to do so in the interests of peace and goodwill. Nothing is gained by letting the people of the United States believe that we acquiesce in the crude notions of international right put forward by their late Secretary of State. It is more open and manly to challenge them at once; so that a clear appreciation of points of difference may be a first step to their settlement on honourable terms. We feel most cordially towards the United States the goodwill Mr Blaine has expressed on their part towards us; and in the interests of that goodwill we join issue with him on almost every point he has raised in his despatches.

Let us take first the argument that the conditions under which the Clayton-Bulwer Treaty was made have entirely changed. Mr Blaine dwells with perfect truth upon the marvellous development of the Pacific States of the Union, and points out that, vast as are the proportions which their trade has already attained, they are but at the beginning of their industrial career. The

patriotic pride with which he describes the giant strides in civilization and wealth they have made within the last thirty years, is laudable in an American statesman : but while he refers with natural exultation to the enormous stake possessed by his country in the free navigation of any canal across the Isthmus of Panama, he ought not to be blind to the fact that the possessions of Great Britain have developed *pari passu* with those of the United States, and that the canal when completed will be an important highway for many of them. When he declares that British interests in the question are "inconsiderable in comparison with those of the United States¹," he forgets that we too have a long Pacific coast line on the west of the American continent, and that great as would be the saving of distance in the voyage from New York to San Francisco if a sea passage were made through the isthmus, there would be an equal saving in the voyage from Halifax to Vancouver Island. The western provinces of the Dominion of Canada are being opened up with marvellous rapidity. By the time this book is in the hands of its readers the longest railway in the world will run through them on its way from the Atlantic to the Pacific. They are the home of a large and rapidly increasing population, whose right of free access by the best sea route to the eastern side of the continent it behoves the mother country to secure by all honourable means. These considerations must be paramount with any British Ministry. But additional reasons for refusal on our part to surrender to the United States the complete control of the Panama Canal are to be found in the fact of its enormous political importance.

¹ Mr Blaine to Mr Lowell, Nov. 19, 1881.

We have seen¹ that as soon as it is completed it will practically revolutionize the political geography of half the world. Not only England but all other great maritime states will have an interest in its security, and a right to a voice in determining the international rules that shall apply to it. If it be true, as Mr Blaine asserts, that the trade of Central America is passing into French and German hands, that is only one reason the more why the principle of joint control and joint protection embodied in the Clayton-Bulwer Treaty should not be superseded by the sole control of the United States. Nor can assent be given to the argument that the vast increase in the prosperity of the Pacific States of the Union was not foreseen when the treaty was made. Earl Granville points out in his despatch of January 7, 1882, that the Monroe Doctrine itself is evidence to the contrary. The American President would not have declared in 1823 that the whole of America was so far occupied by civilized states that it was foreclosed against colonization by any European power, unless he had made up his mind that the opening up of vast tracts of western territory, then unexplored by civilized man, was a work of the immediate future. What was anticipated in 1823 could hardly have been left out of consideration in 1850, when considerable progress had been made towards its accomplishment. In truth the Clayton-Bulwer Treaty was made in order to provide beforehand for a set of circumstances similar to those which have actually arisen.

Mr Blaine's attempt to shew that the conditions under which the treaty was signed were temporary in

¹ *Ante*, p. 97.

their nature, and can never be reproduced, breaks down in face of the fact that present conditions are only a more marked and developed form of the conditions which existed in 1850. He is still more unfortunate in his remarks, when he comes to analyse the provisions of the treaty with a view to shewing that they were grossly unfair as between the two signatory powers. What he says is so remarkable, both in its inaccuracy, and in its misconception of the true principles applicable to the case, that I will give it in his own words. In his dispatch of November 19, 1881, he says :¹

“The respect due to Her Majesty’s Government demands that the objections to the perpetuity of the Convention of 1850, as it now exists, should be stated with directness and with entire frankness. And among the most salient and palpable of these is the fact that the operation of the treaty practically concedes to Great Britain the control of whatever canal may be constructed. The insular position of the Home Government, with its extended colonial possessions, requires the British Empire to maintain a vast naval establishment, which, in our continental solidity we do not need, and in time of peace shall never create. If the United States binds itself not to fortify on land, it concedes that Great Britain, in the possible case of a struggle for the control of the canal, shall at the outset have an advantage which would prove decisive, and which could not be reversed except by the expenditure of treasure and force. The presumptive intention of the treaty was to place the two powers on a plane of perfect equality with respect to the canal. But in practice, as I have indicated, this would prove utterly delusive, and would instead surrender it, if not in form yet in effect, to the control of Great Britain.

The treaty binds the United States not to use its military force in any precautionary measure, while it leaves the naval power of Great Britain perfectly free and unrestrained, ready at any moment of need, to seize both ends of the canal and render its military occupation on land a matter entirely within the discretion of Her

¹ *United States*, No. 1 (1882).

Majesty's Government. The military power of the United States, as shewn by the recent Civil War, is without limit, and in any conflict on the American continent, altogether irresistible. The Clayton-Bulwer Treaty commands this Government not to use a single regiment of troops to protect its interests in connection with the interoceanic canal; but to surrender the transit to the guardianship and control of the British navy. If no American soldier is to be quartered on the isthmus to protect the rights of his country in the interoceanic canal, surely by the fair logic of neutrality, no war vessel of Great Britain should be permitted to appear in the waters that control either entrance to the canal.

A more comprehensive objection to the treaty is urged by this Government. Its provisions embody a misconception of the relative positions of Great Britain and the United States with respect to the interests of each Government in questions pertaining to this continent. The Government of the United States has no occasion to disavow an aggressive disposition. Its entire policy establishes its pacific character, and one of its chief aims is to cultivate the most friendly and intimate relations with its neighbours—both independent and colonial. At the same time, this Government with respect to European states will not consent to perpetuate any treaty that impeaches our rightful and long-established claim to priority on the American continent."

Taking these sentences in order, we may remark that the argument of the first paragraph proves a great deal too much for Mr Blaine's purpose. If the power of Great Britain at sea is so overwhelming that the canal would be at its mercy in the event of a war, what is the use of the sole guarantee of the United States? Mr Blaine desires that they should be free to fortify the banks of the canal and quarter soldiers on the isthmus to protect it. But land forces and land batteries would be of little value, when a belligerent fleet, keeping out of reach of their guns, could blockade both ends of the canal in perfect security. It is clear that on Mr Blaine's premises the proper conclusion is, that no guarantee of

neutrality can be effective unless Great Britain joins in it.

The next point to be noticed is the assertion that the treaty leaves Great Britain free to seize the canal and its approaches with her fleet, while it forbids the United States to land a single regiment of troops on the isthmus. A more inaccurate statement was never made. With respect to the canal which is now in course of construction, the treaty does nothing more than provide that Great Britain and the United States shall enter into an agreement for its protection. The details of that agreement are left to be settled when the occasion arises. Probably Mr Blaine assumed that they must be in all respects the same as the provisions relating to the defunct Nicaraguan Canal, in which case he is grievously in error about their nature. Article ii. of the Clayton-Bulwer Treaty stipulates that "vessels of Great Britain and the United States traversing the said canal shall, in case of war between the contracting parties, be exempted from blockade, detention, or capture by either of the belligerents," and article v. binds the contracting parties to protect the canal from "interruption, seizure or unjust confiscation," and to guarantee its neutrality so that it "may be for ever open and free." If, therefore, the rules applied by the treaty to the canal contemplated in 1850 are held to be applicable to the canal now being made, Great Britain is not only expressly restrained from doing that which Mr Blaine asserts she is free to do whenever she chooses, but is also bound to prevent, by force of arms if necessary, such action on the part of any other power. I cannot understand how a responsible statesman, writing with the treaty before him, can have so strangely mistaken her position under it.

But in Mr Blaine's estimation the head and front of the offence of the treaty is that it embodies "a misconception of the relative position of Great Britain and the United States" with regard to the affairs of the American continent. Priority is asserted for the latter power. The precise position of the former is not defined. We are left to infer that it is below that of the Central American Republics, whose rights are acknowledged in words, though little account is taken of them when it comes to making practical proposals. England, on the other hand, is told in unmistakable language that these matters do not concern her at all, and that she must keep her hands off them. It never seems to have occurred to Mr Blaine, when he peremptorily informed all whom it may concern, that the Panama Canal is "strictly and solely an American question to be dealt with by the American Government," that Great Britain is an American power, second only in strength and importance to the United States themselves. If she had no treaty rights in the matter, and were dependent entirely upon equitable considerations for her claims to be heard, it would be the height of injustice to refuse her a voice in the settlement. There is something supremely ridiculous in excluding the power which owns the Dominion of Canada from negotiations to which Costa Rica and Honduras are to be freely admitted. But we have no need to rely entirely upon our position as a great American power, in support of our claim to share in the protection of the Panama Canal. The United States admitted that claim thirty-five years ago, and bound themselves by treaty to the principle of an international guarantee. Mr Blaine set the treaty aside, with the remark that the United States would not consent to perpetuate it. It was

necessary, therefore, to press home the question, What right had they to repudiate it? The difficulty of giving a satisfactory answer was evidently felt. A good cause does not need the support of strained constructions, doubtful law, and still more doubtful history.

Mr Blaine is not content with claiming for the United States the sole control of any canal that may be made across the Isthmus of Panama. He seeks to shew that in making this claim on behalf of his country he is only following the example set by Great Britain in the matter of the route to India. He argues that if we hold ourselves justified in occupying all the strategic points along the shortest way to a distant dependency, we cannot object to the assumption by the United States of control over a water-way which will, when finished, connect two portions of their own territory. Like many other arguments of the same statesman, this would be very cogent if the assumptions on which it is based were true. As a matter of fact they are the very reverse of the truth. Mr Blaine alleges that "Great Britain holds and fortifies all the strategic points that control the route to India"; that "at Gibraltar, at Malta, at Cyprus, her fortifications give her the mastery of the Mediterranean;" and that "she holds a controlling interest in the Suez Canal, and by her fortifications at Aden, and on the island of Perim she excludes all other powers from the waters of the Red Sea, and renders it a *mare clausum*."¹ These statements rear a prodigious edifice of fiction upon a small foundation of fact. The truth is that our position at Gibraltar, Malta, and Aden was assured to us by conquest and treaties long before there was a road to

¹ Mr Blaine to Mr Lowell, Nov. 19, 1881.

India through the Suez Canal; that we have never fortified Cyprus; that instead of commanding the Mediterranean we are exposed along its whole length to a flank attack from the powerful navies of France and Italy; and that, though we hold nearly half the shares in the Canal Company, and supply about four-fifths of its annual income, we are not able to control the Suez Canal, and have consented for years to suffer great inconvenience in our trade rather than adopt high-handed measures with regard to it. And further, we are at the present moment taking the lead in proposals to neutralize it. The island of Perim has not been made into a fortified station commanding the southern entrance to the Red Sea, the weak works upon it being adapted only to repulse attacks on the lighthouse by predatory Arabs¹; and the Red Sea itself is no more an English *mare clausum* than is the Atlantic Ocean. I do not suppose Mr Blaine knew what was meant by a *mare clausum* when he wrote the sentence in which the phrase occurs. It signifies in International Law a sea over which territorial dominion is exercised by a power claiming to possess it in full sovereignty, as opposed to a sea which belongs to no state, but is left as a common highway for all mankind. The old claims to exclusive sovereignty over vast tracts of open ocean have been expressly or tacitly withdrawn for generations past. No sea is now a *mare clausum* unless it is practically an inland lake, entirely surrounded by the land territory of a single state. It is true that there are one or two English settlements on the shores of the Red Sea; but there are French and Italian settlements also: and Mr Blaine could assert that it was a

¹ Earl Granville to Mr West, Jan. 7, 1882.

French or an Italian possession with as much reason as he has for declaring it to be an English *mare clausum*. The rhetorical sentence in which the phrase occurs is sadly out of place in what ought to have been a sober and closely-reasoned state paper. In fact, the argumentative weapon which Mr Blaine essays to use against Great Britain can easily be reversed, and turned against the hand that wields it. If we, with our great strength at sea, have never sought to obtain possession of the Suez Canal, but have instead been the first and only power which has proposed to neutralize it, how much more ought the United States, with their small and weak navy, to consent to the neutralization of the Panama Canal, since they are bound by antecedent engagements to do so.

Probably Mr Blaine would answer this argument by saying that the United States desire above all things to neutralize the Panama Canal, their objection being not to its neutralization, but to the guarantee of its neutrality by the Great Powers of Europe. He declares that under the thirty-fifth article of the treaty of 1846 with New Granada the perfect neutrality of the isthmus, and in consequence of all the transit routes across it, is already guaranteed by the United States, and that their guarantee "does not require re-enforcement, or accession, or assent, from any other power¹." In the course of his diplomatic controversy with Earl Granville he repeats over and over again his assurance that the United States desire to see the canal reserved as a peaceful highway for the commerce of all nations, and that they claim for themselves no exclusive privileges in the use of it; but

¹ Mr Blaine to Mr Lowell, June 24, 1881.

he also declares with emphasis that the neutral character of the canal will be best preserved by intrusting it to the guardianship of his own country, and that any attempt on the part of the European powers to put it under their joint protection "would partake of the nature of an alliance against the United States, and would be regarded as an indication of unfriendly feeling¹." When confronted with the Clayton-Bulwer Treaty, he suggests such alterations in it as would make it satisfactory from his point of view. If, therefore, we examine carefully these proposed alterations, developing and elucidating them, when necessary, by comparison with other portions of Mr Blaine's despatches, we shall arrive at the project of so-called neutralization which finds favour with him, and shall be able to decide how far it is in accordance with International Law and the treaty obligations of the United States.

It is plainly set forth in Mr Blaine's scheme that the canal is to be under the sole guarantee of the United States. They are to be free to fortify it, and to acquire by voluntary cession from the Central American Republics the military and naval stations necessary for its protection. They are, however, to make no other acquisitions of territory in Central America, and Great Britain is to remain bound, as at present, not to exercise dominion therein. If England wishes to have a free port established at each end of the canal, the United States will make no objection, and they will be glad to see an agreement between the Great Powers of the world in limitation of the rights of belligerent capture at sea within a fixed distance from either

¹ Mr Blaine to Mr Lowell, June 24, 1881.

entrance. When the canal is finished they will, in conjunction with the local Sovereign, issue a code of rules for its use. The salient points in these rules will be that in time of peace the canal will be open to the passage of merchant vessels of all nations on equal terms as to tolls and other dues, and also to the innocent passage of ships of war; but that in time of war no public armed vessels, except those of the territorial power and the United States, will be allowed to pass through it¹.

It is obvious that this scheme is contrary to the spirit as well as the letter of the treaty obligations of the United States. If Mr Blaine were not so completely dominated by the idea of the supremacy of his country on the American continent, he would have seen that what he called amendments and improvements were in reality proposals for the destruction of the Convention of 1850, and the substitution for it of another agreement founded on a principle the very opposite of that which was then adopted. The eighth article of the Clayton-Bulwer Treaty expressly contemplated the adhesion of other powers to the plan to be drawn up by Great Britain and the United States for the protection of any future Panama Canal; for it declared that if such a water-way was ever made, it was to be open on equal terms to the subjects and citizens of Great Britain and the United States, and also to the subjects of "every other State which is willing to grant such protection as Great Britain and the United States engage to afford." Clearly its principle was neutralization by international guarantee. Mr Blaine's principle is protection by the sole guarantee of the United States.

¹ Mr Blaine to Mr. Lowell, Nov. 19, 1881.

Yet he describes his proposals as being directed towards freeing the Clayton-Bulwer Treaty from all "embarrassing features," and leaving it "as its framers intended it should be, a full and perfect settlement, for all time, of all possible issues between the United States and Great Britain with regard to Central America¹." The utter destruction of a thing does no doubt free it from all features, embarrassing or otherwise; but how the abrogation of a treaty, and the substitution for it of a new agreement directly contrary to it both in letter and spirit can be described as making it into a full and perfect settlement, I cannot understand. We must, I think, conclude, in spite of Mr Blaine's assurances, that his proposals amount to nothing more or less than the complete overthrow of the instrument he professes his anxiety to preserve.

Let us now consider how these proposals look from the point of view of international justice. Merely by reading them through we see that they are unfair as between Great Britain and the United States. The former power is to be bound to refrain from all territorial acquisitions in Central America, the latter is to be free to accept from the local Republics cessions of strategic points along the banks of the canal or commanding its approaches. No English Government is likely to entertain so one-sided a proposition. As Lord Malmesbury declared in 1858, if the Clayton-Bulwer Treaty is to be torn up, this country must recover its liberty of action in the regions with which that document is concerned. The statesmen of Washington cannot on any principles of equity claim for themselves in

¹ Mr Blaine to Mr Lowell, Nov. 29, 1881.

these territories the advantages of freedom, and also the advantages gained by the renunciation of freedom. They cannot eat their cake and have it too. Moreover the prohibition of maritime capture within a wide distance of either end of the canal would be most one-sided in its operation, when taken in conjunction with the liberty demanded by the United States to erect fortifications commanding the water-way. They would be able to sink all enemy ships which attempted to pass through; while their adversaries would be forbidden to capture any vessel of theirs as it made for the entrance.

Further, the plan of Mr Blaine is obviously detrimental to the integrity and independence of the Central American Republics, over whom he ostentatiously casts the mantle of the protection of the United States. They are to be free to cede portions of their territory to their powerful neighbour; and we know what liberty to get rid of places and positions means under such circumstances. In 1881 the vast importance of the canal to the security and prosperity of the Union was made the pretext for denouncing treaty obligations and warning off Europe from the isthmus. In 1884 it was the excuse for obtaining from Nicaragua territorial concessions of a most important and far-reaching kind. At present the policy of the Great American Republic is controlled by men who are wisely determined to take no part in dubious enterprises beyond her borders. But if ever it gets back into the hands of Mr Blaine, the independence of the Central American republics will indeed be in evil plight. In the very despatch in which he dwells upon the peaceful purposes of the United States, and the utter impossibility of any quarrel be-

tween them and their republican brethren to the south, he declares that his country must possess "the absolute control of the great water-way which shall unite the two oceans," and that she "will always insist upon treating it as part of her coast line¹." This last phrase cannot be explained away as a rhetorical ornament. It occurs several times in the despatches under slightly altered forms; and it is evident that the idea which underlies it was frequently present in the mind of its author. He writes of the "domestic function of the long sought water-way between the two seas that border the Republic;" and in another place he speaks of the canal "as forming substantially a part of our coast line²." These words have an ominous meaning; and if the statesmen of the Republic of Colombia can read them without wincing, they must be strangely indifferent to the independence of their country.

PART III.

THE MEANS OF NEUTRALIZING THE CANAL.

We now come to the consideration of Mr Blaine's scheme as concerned with the rights and duties of states in general, that is to say in its relation to International Law. It is vitiated throughout by a fundamental misconception of the meaning of the term *neutralization*, and a fundamental error as to the means whereby a true neutralization can be brought about. It assumes that a territory or a thing is neutralized whenever any power, other than the state to which it belongs, covenants to

¹ Mr Blaine to Mr Lowell, Nov. 19, 1881.

² Mr Blaine to Mr Lowell, June 24, 1881.

assist the territorial power in protecting it from attack and keeping it free from direct hostile operations. Mr Blaine asserts that "the United States recognizes a proper guarantee of neutrality as essential to the construction and successful operation of any highway across the Isthmus of Panama¹," while at the same time he declares with emphasis that no European power can be allowed to assist the United States in protecting the proposed canal. Mr Frelinghuysen says that "a canal across the isthmus can be created, and under the Protectorate of the United States and the Republic whose territory it may cross, can be used by all nations²." Evidently they both consider neutralization and protection to amount to the same thing. They imagine that if they can prove the United States to be powerful enough to ward off all attack from the isthmus, they have shewn that it is effectually neutralized by their guarantee. I believe they are altogether wrong both in law and in fact. To assume a Protectorate over a spot is a very different thing from neutralizing it, else the English Protectorate of the Mosquito Indians would have been equivalent to the neutralization of the Atlantic end of the Nicaraguan route; and even if the two things were the same, the proffered protection of the United States would not be sufficient to neutralize the Panama Canal, for the simple reason that it could not be effective while our American kinsmen retain their present policy of keeping up a small navy.

In order to make good the first of these positions I must enter upon a short analysis of neutrality and neutralization. A state is neutral when it does not take

¹ Mr Blaine to Mr Lowell, June 24, 1881.

² Mr Frelinghuysen to Mr Lowell, May 8, 1882.

part in a war that is raging between other states. A person is neutral when he is a subject of a neutral state, and does not divest himself of the neutral character thus impressed upon him by voluntarily entering into the service of either of the belligerents. A thing is neutral when it belongs to a neutral state or a neutral person, and is not used by those who have control over it in such a way as to deprive it of its neutral attribute. Thus in ordinary neutrality there are two elements—the element of abstention from acts of war, and the element of freedom to abstain or not to abstain at pleasure. Now if we take away the latter, we get neutralization. A neutralized state is a state which is bound by a great international treaty not to go to war except for the defence of its own frontiers from attack, and which has received in return a guarantee from the Great Powers to respect its independence themselves, and to protect it if attacked by others. Such are Switzerland and Belgium under the treaties of 1815 and 1839 respectively, and such is not Panama under the treaty of 1846. Neutralized persons and neutralized things are those which are exempt by convention from the operations of war, to which otherwise they might be subject. Military doctors, nurses and ambulances will serve as excellent examples. They were neutralized by the Geneva Convention of 1864¹. Neutralized states, persons and things stand in the same position with regard to any war that may be going on as neutral states, persons and things; but they differ from the latter in that they are bound by inter-

¹ For an able account of the proper meaning of *neutralization*, see Prof. Holland's paper on "The International Position of the Suez Canal" in the *Fortnightly Review*, July, 1883.

national agreement to take no part in hostilities, and are protected from warlike operations as long as they observe this obligation.

Such being the nature of neutralization, it is obvious that where it takes place the rights and duties of all states likely to be affected by the change are considerably modified. They are unable to make war where they were previously free to do so; but on the other hand they are under no apprehension of danger in quarters where they would otherwise have been liable to attack. For instance, the position of France has been changed to a very great extent by the neutralization of Belgium. Her North Western frontier is covered and protected by a mass of territory, through which no foe can attempt to strike her without at the same time violating the public law of Europe, and calling down upon himself in all probability the hostility of some or all of the powers who have guaranteed Belgian neutrality. But this security is purchased by an obligation to refrain from attacking Belgium, which, but for the fear of intervention on the part of the states pledged to protect it, would probably before now have been added to the French dominions.

Now it is a fundamental principle of International Law that the rights and obligations of states cannot be altered without their express or tacit consent. It is clear, then, that since neutralization alters the rights and obligations of states, it cannot lawfully be effected without the consent of all the states whose legal position would be changed were it brought about. This conclusion disposes at once of the claim of the United States to have neutralized the Isthmus of Panama by their sole guarantee. They have done nothing of the kind;

because, great and powerful nation though they are, they cannot legislate for all the world. The use in the treaty of 1846 of the words, "The United States guarantee...the perfect neutrality of the before-mentioned isthmus," does not alter the case at all. I do not gain the right to settle the destination in life of my neighbour's children, because I have used the term *guardianship* in an agreement to take care of his family while he and his wife go away for a holiday. The word must be interpreted in a loose and general sense, for the agreement would be altogether illegal if its technical meaning were attached to it. In the same way the guarantee of *neutrality* contained in the treaty with New Granada must be interpreted to mean nothing more than a promise of protection in case of attack. And there can be little doubt that the United States themselves understand it in this sense; for we find Mr Frelinghuysen speaking of affording protection, where Mr Blaine speaks of guaranteeing neutrality.

Throughout the controversy the disputants on either side make no attempt to define clearly the terms round which their disagreement centres; and indeed in the whole mass of treaties, despatches, and documents of all kinds relating to the various transit routes across the isthmus, the phrase *guarantee of neutrality* is used in a vague sense, to signify nothing more than a stipulation on the part of one power to refrain from warlike operations on a given spot, except in the case of defensive measures taken in conjunction with the local sovereign. Thus the fifth article of the Clayton-Bulwer Treaty pledges Great Britain and the United States to "guarantee the neutrality" of the Nicaraguan Canal, and in the eighth article they agree to "extend their

protection" to any future transit route across the isthmus. The two obligations are obviously regarded as amounting to the same thing; though a lurking sense of the truth that two powers cannot neutralize a spot by agreement among themselves, may be inferred from the stipulations in favour of inviting other states to join in the guarantee. But nevertheless we find the same incorrect use of terms in subsequent instruments drawn up for the purpose of carrying out the policy of the convention of 1850. The abortive Clarendon-Dallas Treaty of 1856 speaks of the "neutrality" of any canal to which the "protection" of Great Britain and the United States "has been or shall be extended." By our treaty of 1857 with Honduras we guarantee "the entire neutrality" of an inter-oceanic railway, which it was then proposed to make through the territory of that Republic. The treaties between Nicaragua and the United States in 1857, and the same power and Great Britain in 1859, mention the extending of protection to, and the guaranteeing the neutrality of, the route through Nicaraguan territory, as if the two phrases were interchangeable. These instances are amply sufficient to shew that diplomatists have used the words *neutrality* and *neutralization* in a very loose sense. But I do not think we have any right to blame them on that account. The idea of conferring the status of neutrality by convention is so new that a proper vocabulary has not had time to grow up around it. It is the business of jurists to supply statesmen with technical terms, and to fix the exact meaning to be attached to them. And now that the question of neutralization has been brought prominently forward in connection with the Suez and Panama Canals, an effort ought to be made to clear up any ambiguity

that may still lurk in the signification of the words used to describe such arrangements as are proposed.

I think it will be found that the sense we have been led to attach to the word *neutralization* by our reasoning from general principles, is the sense that it really bears in practice, whenever what would be universally regarded as a true neutralization has been effected. Everybody agrees that Switzerland and Belgium have been completely neutralized, the reason being that their permanent neutrality is guaranteed, not by one or two states only, but by all the Great Powers of Europe. No one doubts that military doctors and military hospitals have been efficaciously neutralized, because nearly all civilised states have signed the Geneva Convention. But the statement made in 1882 by M. de Lesseps, that the Suez Canal was already neutralized, met with no acceptance, because the so-called neutralization was effected by a declaration of one power only. And in the same way the statement of Mr Blaine that the Panama Canal, and indeed the whole Isthmus of Panama, is already neutralized, cannot be regarded as correct, since the neutrality of the district in question is guaranteed by the United States only. Their treaty of 1846 cannot take away the right of France, or Italy, or any European power, to attack the isthmus, if it should be at war with the Republic of Colombia, of whose territory Panama forms a part. All it can do is to pledge them to assist Colombia in repelling the attack. Similarly the other single-handed or partial guarantees of neutrality to which I have referred, amount in practice to nothing more than treaties of defensive alliance. They promise protection, they do not effect neutralization. The status of neutrality cannot be permanently and efficaciously conferred unless all powers,

or at least all powers likely to be interested, unite in the necessary guarantee. Then, if any one of them attacks the territory that has been neutralized, it breaks an agreement embodied in the public law of nations, and thereby renders itself a malefactor, liable to summary punishment from its fellow guarantors. But in the absence of any such agreement, a state is free to make war on any other state against which it deems itself to have sufficient ground of complaint, and no third power or group of powers has a right to attack it in consequence as a disturber of a solemn international act. Moreover a true treaty of neutralization imposes upon the state which is neutralized the duty of refraining from all acts of hostility except in the case of actual invasion. It is only fair and reasonable that a territory which is never to be attacked should be bound never to attack. Yet such a general duty cannot be imposed upon it by one power. All must act together to create an obligation due to all, just as all must act together to confer a right available against all.

It is easy to apply these considerations to the case of the Panama Canal. As soon as it is completed, it will become an object of direct and pressing interest to every maritime power. It will not be hidden away in some remote corner, where it can be safely left in obscurity, to be dealt with by the state through whose territory it passes. On the contrary, it will be one of the great trading routes of the world, and its political importance to a very large number of states can hardly be exaggerated. The example of the Suez Canal is sufficient to shew the inconvenience of allowing its position in International Law to remain undetermined; and it is clear that a definite set of rights and obligations with regard to it

can only be created by general agreement. When Mr Blaine and Mr Frelinghuysen rejected the co-operation of Europe in this matter, they rejected the sole means whereby their professed object could be carried into effect.

Moreover, when the future status of a great Oceanic Canal is in question, there are special difficulties to be encountered, which make it more than usually necessary that a concert of the powers should be arrived at. In ordinary cases of neutralization the previous position in International Law of the object neutralized is perfectly clear. Belgium, for instance, is a state. It had, therefore, when neutralized, the rights and duties of a neutral state stamped upon it by international agreement. Military doctors are individuals. They had, therefore, when neutralized, the rights and duties of neutral individuals stamped upon them by international agreement. But what are Oceanic Canals? In the previous essay, when considering the case of the Suez Canal, I have shewn that they partake partly of the character of narrow natural straits connecting two open seas, partly of the character of inland means of communication, and partly of the character of international works under the control of the Great Powers¹. In which capacity is the Panama Canal to be neutralized? If as a strait, one set of rules will be applicable to it, if as an interior water-communication, a second; if as an international work, a third. A double difficulty hangs over it—the difficulty of neutralization, and the difficulty of fixing its legal position apart from neutralization. Surely the one peaceful means of dealing with it is by international

¹ Ante, pp. 47—57.

agreement. The attempt of Mr Blaine and Mr Frelinghuysen to cut the Gordian knot by withdrawing it from the consideration of the powers, and settling all matters concerning it by the mere will of the United States, is neither just in itself, nor in accordance with International Law, nor consonant to treaty stipulations, nor likely to offer any security for peace. When so many warring interests are concerned, nothing short of a general agreement and a general guarantee can reconcile conflicting claims, and create a sanction strong enough to overawe any state that may be inclined to take the law into its own hands. There can be no doubt that the world wants the Panama Canal neutralized as a narrow strait connecting two open seas, and that the only way whereby the universal desire can be carried into effect is the way objected to by the United States.

I am not without hope that juster views of neutralization will remove some of the apprehensions entertained in America with regard to the results of an international guarantee of the neutrality of the Panama Canal. It seems to be supposed that if such a guarantee was given, the political system of the Old World would be introduced into the New, and the Great Powers of Europe would gain a right to interfere in purely American disputes, and exercise a general supervision over the affairs of the American continent. No one can wonder at the strong objections felt at Washington to any such interference. President Monroe laid down a wise and statesmanlike doctrine, when he declared in 1823 that while the United States would not interfere in purely European disputes, her people would consider any attempt on the part of the powers of Europe to extend their system to any portion of the American Continent, as dangerous

to her peace and safety. It has been the fate of this declaration to be perverted at home, and misunderstood abroad. Yet the plain meaning of the words, and the circumstances under which they were written, alike shew that it gives no countenance to the doctrine that the United States is destined to control the whole of America, and will repel by force any interference with her advances in this direction. All it does is to declare that the complicated state system of the Old World—the system of the Coalitions against Napoleon, the Holy Alliance, the Balance of Power, the Eastern Question, and the European Concert—shall not be extended to the New World, and that the United States, while determined to prevent such a contingency, will on its part abstain from interference in disputes which concern the powers of Europe only. There was no intention of pledging the Republic to refrain from dealing with European affairs when they directly concerned her interests, and assuredly her statesmen have never practised such unwholesome self-denial. They took, for instance, a prominent part in the negotiations with Denmark for the surrender of the Sound Dues; and only five years ago Mr Evarts, the immediate predecessor of Mr Blaine in the office of Secretary of State at Washington, gave his assent on the part of his country to the Egyptian Law of Liquidation¹. A still more recent example of participation in the settlement of matters external to the American continent is afforded by the presence of representatives of the United States at the great West African Conference which sat at Berlin during the winter of 1884—5². The famous message of President Monroe was in one sense itself an interference in Euro-

¹ *Egypt*. No. 10 (1884).

² *Africa*. No. 4 (1885).

pean affairs; for that portion of it we are now considering was framed after careful negotiations with Mr Canning, then Foreign Minister of Great Britain, and was directed against the Holy Alliance. It was an interference justified by American interests; for the Alliance was contemplating at the time the re-conquest for Spain of its revolted transatlantic colonies; but nevertheless it was an interference. Thus the very doctrine which is relied upon to shew that there is in political matters a Chinese wall of separation between the Old World and the New, affords conspicuous proof to the contrary. And just as American interference in European affairs is permissible when American interests are clearly involved, so is European interference in American affairs justifiable, if definite and unmistakable European interests are concerned. The Monroe Doctrine objected to the trajectory of European state systems across the Atlantic; but it did not declare for the closure of the American hemisphere to European diplomacy. This is abundantly clear from subsequent history, as well as from the words of the declaration. The Clayton-Bulwer Treaty, and the long negotiations which centred round it, shew that the statesmen of the Union recognized the fact that Europe and their own continent had some affairs in common.

Mr Blaine and Mr Frelinghuysen evidently imagined that an international guarantee of the neutrality of the Panama Canal would introduce the European state system into the American continent. They therefore fell back on the Monroe Doctrine, and declared that such a guarantee was inadmissible. We have already insisted upon the obvious retort that the United States are bound by treaty to admit the cooperation they objected to, and that the treaty obligations of a state are superior in

authority to declarations of its executive officers¹. Without attempting to elaborate this argument further, I will endeavour to shew that a general international guarantee of the water-way across the isthmus is not equivalent to the introduction into America of the dreaded external policy of the European commonwealth.

For what is a guarantee of neutrality? It is the very reverse of interference. It is an agreement not to interfere, a promise to leave unmolested the state or thing neutralized, and to prevent, if necessary, any attack on it by others. A general international guarantee of the neutrality of the Panama Canal would be equivalent to the general adoption of a policy of "hands off, all round!" Under it the state of things contemplated by the Monroe Doctrine would be more nearly realized than under any other arrangement. The powers of Europe would be bound by a solemn international act not to attack the canal, and each would be enrolled among its guardians in the event of any interference with it. If any one of them occupied or fortified it, a breach of International Law would be committed, and all the others would treat the offender as a criminal. Mr Frelinghuysen desired that the citizens of the United States might, "without any armed assertion of right, be conveyed by water-transit from their western to their eastern shore without passing under the guns of European powers²." The international guarantee he rejected is the best and indeed the only way to attain his end. For it is necessary to point out, in answer both to him and to Mr Blaine, that the guarantee of the United States would not in the nature of things be sufficient. We have seen that it cannot alter

¹ Ante, p. 125.

² Mr Frelinghuysen to Mr Lowell, May 8, 1882.

the legal position of other states. Under the common law of nations the powers of Europe are at liberty to negotiate with, or make war upon, any American state, Colombia included. The fact that the United States is pledged to protect the Isthmus of Panama might make them hesitate before they directed their warlike operations against it, but it would not take away their legal right to attack. And when the canal is made, so great will be its importance, that in course of time some power or powers may deem it worth their while to risk the hostility even of the United States, rather than refrain from seizing it. Has the Republic the power to prevent them? Mr Blaine has demonstrated that it has not, in the graphic passage in his despatch of November 19, 1881, where he alludes to the overwhelming strength of England at sea, and points out how easily she could make herself master of the water-way. But he does not seem to have observed the inconsistency of maintaining at the same time that an American guarantee would be quite sufficient to neutralize the isthmus without "reinforcement, or accession, or assent, from any other power." What is the use of a guarantee, when the guarantor can make an attack on the object guaranteed neither a legal offence, nor a physical impossibility? If the law cannot be enlisted on the side of the guarantee, the strength at the back of it ought to be overwhelming. But in the case before us the power to alter the law so as to make an attack on the thing guaranteed an offence, and the power to bring irresistible force to bear upon the attacking state, exist together in the arrangement objected to by the President Arthur's Administration, while in the settlement preferred by it is found neither the one nor the other. From the nature of the case the Panama Canal must be a matter

of European interest. The maritime states of the world cannot help being affected by it. It is absurd to suppose that they will not exercise the power which is theirs by International Law of safe-guarding their interests in all quarters, including the Isthmus of Panama. They must have a voice in whatever arrangements are made with regard to the interoceanic canal. If the United States arrogated to herself the right to make what rules she pleased in the matter of its navigation and protection, she would have to be prepared to meet objections, and perhaps hostility, from any states whose interests were injuriously affected thereby. No declaration by an American President or Secretary of State can alter the rules of International Law, or change the physical conformation of the globe; and as both stand to-day, the maritime powers of Europe have interests to protect in the isthmus, and a right to take measures for their protection. Allow them to join with the United States and with one another in a great league for the purpose of neutralizing the Panama Canal, and all interests are secured by a scheme which at once reconciles and protects them. Insist, on the other hand, that one power shall have exclusive political influence over the isthmus, and all order vanishes in a chaos of conflicting claims and divergent policies.

Which result is to be reached in the immediate future? The answer to this question depends chiefly upon the rulers and people of the United States. They have shewn a tendency of late to return to the old and just policy which found favour with their predecessors: and it would redound to the lasting honour of President Cleveland and his advisers, if they settled this great and thorny question on the lines laid down by the last

Democratic Cabinet in the controversy which terminated in 1860. Mr Blaine's assertion that the new and domineering policy invented by him is but a development of the old¹, will not bear a moment's examination. President Taylor, in his Message of December 31, 1849, advocated the neutralization of the proposed Nicaraguan Canal, and declared his belief that the great maritime states of Europe would consent to "a proposition so fair and honourable." The Clayton-Bulwer Treaty speaks for itself. It provides for the joint protection of any Panama Canal by Great Britain and the United States; and it contemplates the adhesion of other powers to a common guarantee of its neutrality. In the course of the long negotiations which arose out of the diverse interpretations of the first article of the treaty, General Cass again and again asserted that his government wanted only the entire neutrality of the interoceanic routes, and their freedom from the exclusive control and influence of any power. He admitted the right of the commercial nations of the world to secure their interests in the unimpeded navigation of any canal that might be made; and he contemplated common action on their part for this purpose². When the controversy was concluded, President Buchanan expressed himself satisfied with a settlement which, as we have seen, left the neutrality clauses of the treaty just as they were before. The policy embodied in them was carried out by successive American Governments in

¹ See the passage in Mr Blaine's despatch, of June 24, 1881, beginning "You will be careful, in any conversations you may have, not to represent the position of the United States as the development of a new policy."

² See his written and spoken declarations quoted in Earl Granville's despatch of Jan. 14, 1882. They can be read at full length in the Blue Book on Central America, published in 1860.

a series of treaties providing for the neutralization of the various interoceanic routes. The last of these treaties was negotiated with Nicaragua in 1867, and it not only guaranteed the neutrality and innocent use of all Nicaraguan routes between the Atlantic and Pacific Oceans, but also bound the contracting parties "to employ their influence with other nations to induce them to guarantee such neutrality and protection." Ten years afterwards, in 1877, proposals were made to Nicaragua on behalf of the United States for joint action in requesting the adherence of the maritime powers to such an agreement; but unfortunately they came to nothing. Thus from 1849 to 1877 there is an unbroken *catena* of American authorities in favour of the policy defended by Great Britain in the present controversy. In 1881 Mr Blaine inaugurated a diametrically opposite policy, and asserted that it was substantially the same as that for which his countrymen had always contended. He was no doubt free to obtain whatever credit may result from a foreign policy of treaty-breaking and annexation; but he was not free to seek at the same time a reputation for sagacity, as an exponent of the time-honoured views of the wisest American statesmen. The issue has been fairly presented to the people of the United States; and there seems good reason to believe that they will prefer to walk in the old paths, and follow the traditional American policy of respecting the rights of others, while insisting upon ample recognition of their own.

In truth they have little to thank Mr Blaine for. He and his successor rushed wildly into a controversy, which they ought to have entered with the greatest circumspection; and when in it they assumed towards us the airs of dictators, when they ought to have

appealed to our good-will. The case of the United States is within certain well-defined limits a strong one ; and had it been properly stated, it could not have failed to obtain a considerable amount of sympathy and assent. If, instead of denouncing the Clayton-Bulwer Treaty on the avowed ground that it recognized British rights in a matter which ought to be under exclusively American control, Mr Blaine had approached us in a conciliatory manner, he might have attained all that was just in his end without difficulty or friction. He should have recognized loyally the obligation to come to an agreement with Great Britain and the other maritime powers for the neutralization of the Panama Canal, and should then have pointed out that the United States have grown so great since the treaty of 1850 was signed, and their interests in the canal are so far superior to those of any other power, that they ought to have a preponderating voice in determining the rules to be adopted. Such a position would have been impregnable. In England no responsible statesman would have felt even the inclination to attack it. Though we desire to see the Suez Canal neutralized, we claim to take the lead in all negotiations on the subject, because our interests in it are far greater than those of any other power. We should be the first to recognize that the United States ought to occupy the same position with regard to the Panama canal, because, important as it is to all maritime states, it is more important to them than to any of the others. And there are ways in which their interests could be safe-guarded in drawing up the scheme of neutralization. I do not think they could fairly claim to exclude from the passage in time of war all armed vessels but their own and those of the terri-

torial power ; but there would be nothing objectionable in the proviso that, if it should ever be necessary to defend the canal from attack, the land operations that might be required should be confided to their army. Such a stipulation would remove that dread of the occupation of the isthmus by the troops of any European power, which seems so important a factor in the calculations of American diplomacy ; while at the same time it would not give rise to any jealousy, since the soldiers of the Union would be present with the assent of all the guaranteeing states.

In order to facilitate an amicable agreement might not the British Government offer to meet the Cabinet of Washington half-way ? The Clayton-Bulwer Treaty has been from the beginning an ill-fated document. It has given rise already to two controversies ; and it is as far as ever from settling the questions it was meant to set at rest. The United States ardently desire to be rid of it. It is not possible for us to gratify them by consenting to its abrogation, without at the same time surrendering the principle that the only means of neutralizing the Panama Canal legally and efficaciously, is to bring about a great international agreement between all the maritime powers ? I think a way to do so may be found, if President Cleveland will agree to repeat a proposal made to Lord Palmerston in 1849 by Mr Abbott Lawrence, the American Minister in London. He forwarded a copy of the treaty of 1846 between the United States and New Granada, and invited Great Britain to join with his country in the guarantee of the isthmus given by its thirty-fifth article. His proposal seems to have been overlooked in the course of the negotiations which resulted in the Clayton-Bulwer

Treaty. If it could be revived now, and extended so as to embrace the other maritime powers, the whole difficulty with regard to the canal would vanish. We should eagerly grasp at an offer which embodied the principle we have been contending for all through the present controversy. The United States would be glad to obtain an amicable release from the obligations of a treaty which they find vexatious. And the Panama Canal itself would be far more efficaciously neutralized than by any other plan. For the neutralization would extend to the whole territory of the little state through which it runs; and thus we should never be confronted with the problem of having to keep the water-way free from hostilities, while warlike operations were carried on along its banks. In the case of the Suez Canal we saw that the practical difficulties in the way of any tolerable solution were insuperable¹. It would be wise, therefore, to avoid them from the beginning in dealing with the sea passage through the Isthmus of Panama. If the maritime powers of the world can be induced to join in a great treaty for guaranteeing the neutrality of the isthmian territory, stipulations binding them not to carry on hostilities at sea within a certain distance of either end of the canal can easily be embodied in it. By the mere fact of neutralization the three miles of territorial water along the coast of Panama would be exempt for the future from naval operations; but probably a neutral zone of twenty or twenty-five miles would be thought to afford better security. The experts in the service of the various states could, no doubt, come to a conclusion on this point without much difficulty, and the Governments would be willing to agree to

¹ Ante, pp. 70—75.

whatever they unanimously recommended. The treaty should also provide for the purchase of the rights of the Panama Canal Company after a given time, and for the limitation in the meanwhile of the amount of dividend it may earn. In these, as in all other matters, it would be necessary for the powers to act with and through the territorial Sovereign. But in all probability little difficulty would be felt in consequence; for it is not to be supposed that the Republic of Colombia would desire to see the company practically master of the isthmus, and as great a hindrance to trade as is the Suez Canal Company to-day. The treaty of 1859 between Great Britain and Nicaragua stipulated that no company in possession of any interoceanic route through the territory of the latter, should directly or indirectly divide among its shareholders more than 15 per cent. per annum from tolls on the route, after ten years from its completion. It would be wise to introduce such a proviso into the contemplated treaty for the neutralization of the Isthmus of Panama, if it can be done without compelling Colombia to violate any concessions already granted to the existing company.

The plan thus sketched out seems both just and feasible; and I am glad to say that it has received favourable notice on both sides of the Atlantic. There is no pressing necessity for action; as nothing need be done till the Panama Canal is on the point of completion. Let us hope that the interval thus gained for calm reflection will enable the two great branches of the English-speaking people to come to an equitable and honourable arrangement on the only subject which appears at present capable of causing a serious disagreement between them.

ESSAY IV.

THE WORK OF GROTIUS AS A REFORMER OF INTERNATIONAL LAW.

AMONG the few books that have changed the history of the world must be reckoned the great work of Hugo Grotius, *De Jure Belli ac Pacis*. At the time of its publication a wave of utter lawlessness threatened to overwhelm all the barriers which had hitherto curbed the ambition of rulers and the ferocity of generals. During the middle ages the influence of the Pope and the Emperor had exercised some restraining force. The rudimentary International Law of that period was based upon the notion that there was a common superior over all states, and that his commands were to be obeyed in disputes between subordinate members of the family of nations. The idea had originated in the universal sovereignty of Imperial Rome; and for a long time fact and theory had corresponded exactly. In the palmy days of the Roman Empire disputes between inferior rulers were referred to the Emperor for settlement, and his decision terminated the controversy. International Law, like Municipal Law, was the command of a superior who had power to compel obedience. Its precepts were laws in

the strictest Austinian sense. They imposed perfect obligations, and were armed with tremendous sanctions. Universal sovereignty was a great reality. The *Majestas Populi Romani* became an object of religious reverence; and the Roman state, incarnate in the person of its Cæsar, was worshipped as a God.

After the fall of the Western Empire the theory of universal sovereignty still survived. Just as Greece conquered her conquerors by bringing them into subjection to her arts and her philosophy, so Rome, amid the ruins of her material power, enslaved the minds of the nations who no longer felt her political yoke. Men held that her dominion was to be eternal as well as universal. Though Rome had ceased to be the seat of Empire, still the Empire itself was Roman. It must live on, they thought, in some shape; and so they cast about to find a power which should be a fit possessor of its world-wide sovereignty. At first the only substitute to be found was the decaying Empire of the East; but from the coronation of Charlemagne in the Basilica of St Peter at Rome, on Christmas Day A.D. 800, the imperial power, and the universal dominion involved in it, were held to have passed to a new line of Frankish sovereigns. The Romano-German Emperors were believed to be the true successors of the Cæsars; and theoretically they possessed all the power of their political ancestors. But their claims were never left entirely unchallenged; and in practice the personal character of each Emperor largely determined the nature and extent of his influence. Gradually the Papacy, which had been the chief agent in reviving the Roman Empire, became its rival in aspirations after universal dominion. The pretended donation of Constantine, and the very real spiritual supremacy exercised by the

Roman Pontiffs, formed the basis of a claim "To give and to take away empires, kingdoms, princedoms, marquises, duchies, countships, and the possessions of all men¹." And this claim was not an idle boast, as was proved in 1077, when the Emperor Henry IV., the most powerful prince in Europe, humbled himself at Canosa before the great Pope Gregory VII.

The International Law of the middle ages was influenced enormously by the conflicting claims of the Pope and the Emperor. The idea of a common superior still lingered among the nations, and greatly assisted the Roman Pontiffs in their efforts to obtain a suzerainty over all temporal sovereigns. For as the Empire founded by Charlemagne gradually decreased in extent, till it scarcely extended beyond the limits of Germany, more and more difficulty was felt in ascribing to it universal dominion. Yet no one dreamed of asserting boldly that independent states had no earthly superior; and therefore, when the Papacy came forward with its claims, men's minds were predisposed to accept them. As an arbitrator between states the Pope often exercised great influence for good. In an age of force he introduced into the settlement of international disputes principles of humanity and justice; and had the Roman Curia always acted upon the principles which it invariably professed, its existence as a great court of international appeal would have been an unmixed benefit.

It is needless here to enter upon any discussion of the causes which gradually undermined the authority of the Papacy, and brought about the Reformation. It will be sufficient to point out the bearing of that great series of

¹ Quoted from Gregory VII.'s second sentence of excommunication on the Emperor Henry IV. See Bryce, *Holy Roman Empire*, ch. x.

events upon the generally received theory of international conduct. According to it either the Pope, or the Emperor, or both, should have calmed the waves of political and religious strife. But instead they joined in the turmoil. The Pope, of course, opposed the Reformers; and the Emperors took the same side. Community of religion became a new bond between states. The Protestant Princes of the German Empire were often in arms against the Emperor. His authority was set at naught within the limits of his own dominions; and outside them he had long received nothing more than honorary precedence as the first potentate in Christendom. Thus the notion of a common superior, exercising sovereign rights over all nations, slowly faded away. Practically it had long been obsolete, and after the Reformation it ceased to exist even in theory. New principles were required, unless states were openly to confess that in their mutual dealings they recognized no law but the right of the strongest.

For a time there was undoubtedly a reaction towards this view. In all periods of history great and unscrupulous rulers have acted upon it, and sometimes, like Frederick the Great and Napoleon, they have not scrupled to avow it. But in the sixteenth century and the first half of the seventeenth it seemed as if the doctrine that in matters of state ordinary moral rules did not apply would meet with universal acceptance. The old landmarks were overthrown in the sphere of international transactions, as in so many other portions of the domain of human conduct. Cruel as were the wars of the middle ages, it is doubtful whether the long struggle between Spain and the revolted Netherlands, and the terrible Thirty Years' War, were not stained by greater atrocities than any perpetrated in the days of chivalry. Flagrant as were the breaches of faith commit-

ted by feudal kings, it is doubtful whether any fraud recorded of the most shameless of them equals in iniquity the cool calculating hypocrisy of the Borgias and the Medici. Yet the worst sign of the times was not the habitual cruelty and bad faith of soldiers and statesmen; but the fact that such conduct was justified by grave writers. Formerly excuses had been attempted. When evil of the kind we are discussing was done, the perpetrators sought to shew that under the special circumstances of the case it was not evil, but good. The ordinary rules of justice and good faith were recognized as binding, only it was pleaded that the matter in hand formed an exception to them. But at the time of the Reformation speculation shewed a tendency to follow in the wake of practice. Since rulers in fact observed no moral rules when dealing with state affairs, it was held that they were under no obligation to do so. Statecraft was separated from other portions of human conduct, and deliberately rendered *immoral*, if not *immoral*. The famous work of Machiavelli, *The Prince*, published in 1522, was at once the evidence and the cause of an immense quantity of this kind of theorizing. It would never have been written had not the air been full of anarchical speculations on the subject of government: and its great influence and popularity among the class for whom it was intended, vastly increased the tendency towards lawlessness in international transactions.

The doctrine of the wise Florentine statesman was that if rulers desired to maintain themselves in power, they must not hesitate to use on occasions means ordinarily accounted wrong. Thus in chapter xv. he says, "He (the Prince) need never hesitate, however, to incur the infamy of those vices without which his authority can

hardly be preserved; for if he well considers the whole matter, he will find that there may be a line of conduct having the appearance of virtue, to follow which would be ruin, and that there may be another course having the appearance of vice, by following which his safety and well-being are secured¹." And this general exhortation to profitable iniquity is followed up in detail. In chapter xviii. the Prince is bidden to resort to cunning and fraud when necessary; for he "neither can or ought to keep his word, when to keep it is hurtful, and the causes which led him to pledge it are removed." For the purpose of imposing upon the world the Prince should seem to have all good qualities; but "if he has and invariably practises them all, they are hurtful, while the appearance of having them is useful. Thus it is well to seem merciful, faithful, humane, religious, and upright, and even to be so; but the mind should remain so balanced that if it were needful not to be so, you should be able to know how to change to the contrary." And again, "You are to understand that a Prince, and most of all a new Prince, cannot observe all those rules of conduct in respect of which men are accounted good, being frequently obliged, in order to preserve his Princedom, to act in opposition to good faith, charity, humanity, and religion. He must therefore keep his mind ready to shift as the winds and tides of fortune turn; and, as I have already said, he ought not to quit good courses, if he can help it, but he should know how to follow evil courses, if he must."

A slight acquaintance with the literature of the sixteenth and seventeenth centuries will shew how widely Machiavelli was read, and how far down among the lower

¹ I quote here and elsewhere from a translation by N. H. T., published in 1882 by Messrs Kegan Paul & Co.

ranks of society a rough and general knowledge of his theories had spread. His name was evidently a by-word in the time of Shakespeare, who speaks of "the murderous Machiavel" and "the notorious Machiavel," and makes even an innkeeper say "Am I politic? Am I subtle? Am I a Machiavel¹?" A few generations later Samuel Butler in *Hudibras* derived a common appellation for the Prince of Darkness from his name, in the well-known lines

"Nick Machiavel had ne'er a trick
 (Though he gave his name to our Old Nick)
 But was below the least of these
 That pass i' th' world for holiness²."

But though he is almost always mentioned with horror by popular writers, few can doubt that the rulers of the period were apt pupils in his school. Charles V. and Philip II. of Spain were constantly quoting him, and Catherine de Medici justified her wickedness by his theories. An antidote was needed to prevent the destruction of all international morality by the poison of his maxims. If ethical considerations were not to be banished from state affairs, some new speculative basis was required for the law of nations. The old idea that it rested upon the command of a superior was no longer tenable. New principles must be forthcoming, if new precepts of mercy and justice were to be received by statesmen renowned for dissimulation and soldiers inured to cruelty. The time cried aloud for a deliverer, who should be at once scholar, philosopher and statesman, and should stand, like Aaron of old, between the living and the dead, and stay the plague of falsehood and wrong.

¹ *Henry VI.* Part III. Act III. Scene 2; *Henry VI.* Part I. Act v. Scene 4; *Merry Wives of Windsor*, Act III. Scene 1.

² *Hudibras*, Part III. Cantc

The hour had come, and the man was raised up in the person of Hugo Grotius, the three hundredth anniversary of whose birth we have recently been engaged in celebrating.

Huig van Groot, generally called Hugo Grotius, was born at Delft on the 10th of April, 1583. His parents were in good circumstances and of noble birth. Before he was twelve years old he was sent to the University of Leyden, which had been founded in 1575 in memory of the siege of the previous year. There the boy grew up amid the later scenes of the long struggle of his Fatherland for liberty and independence; and almost before he reached man's estate he was himself an actor in the great drama. As a lad he must have heard from many of the defenders of Leyden heart-stirring stories of the terrible siege, when famine, and pestilence, and the sword of the Spaniard, had well nigh destroyed the devoted city. He must often have attended service in the great church where the thanksgiving hymn broke down amid the sobs of thousands who wept aloud for joy at their deliverance. In his walks he must have wandered over the country occupied by the lines of Valdez, and have gazed from the ramparts at the fields which had been restored to the waves, in order that Boisot and his Zealanders might sail overthem to the relief of their famine-stricken compatriots. Nurtured among these memories he learned the ardent patriotism which distinguished him through life, while he escaped in a marvellous manner the taint of that ferocity which civil war so often engenders. At the University he obtained the notice of some of the foremost scholars of the time. The learned Douza, who was soldier and poet as well as scholar, and who had commanded the forces of Leyden during the siege, declared that "he

could scarcely believe that Erasmus promised so much as Grotius at his age," and foretold that he "would soon excel all his contemporaries, and bear a comparison with the most learned of the ancients¹." And when at fifteen he was attached to the embassy of Barneveld to France, Henry IV., in admiration of his precocious abilities, spoke of him as the "miracle of Holland." These anticipations were destined to be fully realized. Grotius became a marvel of erudition; and, moreover, he was always completely master of his enormous learning. His training in practical affairs kept him from pedantry, and his wide culture gave breadth and dignity to his views of life. He was at once a great scholar, a great theologian, a great lawyer, an acute diplomatist, an able historian, and a melodious poet. And in all the controversies in which he was engaged he was invariably on the then unpopular side of peace and tolerance. He did not, it is true, rise to the modern conception of complete religious liberty; but he laboured earnestly to bring about union between the different Christian communities, and always endeavoured to persuade the advocates of warring creeds that their points of agreement were more important than their differences. He did not, it is true, see that if the United Netherlands were to remain a great and powerful state, the separate privileges of each province must be curtailed, in order that the central government might gain an adequate degree of strength. But he never copied the illegal violence of his political opponents, and never faltered in his loyalty to the ungrateful country which first imprisoned and then exiled him.

It is impossible to give here a biography of Hugo

¹ Butler, *Life of Grotius*, p. 46.

Grotius. All that can be done is to mention a few of the chief events in his career. At the age of seventeen he began to practise at the bar; and at twenty-four he was made Advocate-General of Holland. In 1609 he published his *Mare Liberum* in favour of the freedom of the high seas from territorial sovereignty. He took the Arminian and State Rights side in the struggle between John of Barneveld and Prince Maurice of Nassau, and was arrested by order of the Prince and the States General on August 29, 1618. In the following year Barneveld was executed, and Grotius condemned to perpetual imprisonment. But in 1621 he was enabled, through the devotion of his wife, to escape from his place of confinement, the castle of Loevestein, in a box which was supposed to contain the books he had borrowed from his friends. After many adventures he reached Paris, and resided there till 1631, living on a pension granted him by the French King. In 1625 he gave to the world his celebrated book *De Jure Belli ac Pacis*, the germ of which is to be found in an unpublished treatise, entitled *De Jure Prædæ*, which he composed in 1604, but which remained unknown till 1868, when it was discovered and printed. Nothing about the great work of Grotius is more remarkable than its rapid and complete success. It was soon taught as public law in the Universities of Heidelberg and Wittenberg. Gustavus Adolphus carried a copy of it about with him in his campaigns, and, it is said, always slept with it under his pillow. In 1648 its leading principles were formally recognized in the Peace of Westphalia. After the death of the great Swedish hero its author entered the service of his successor, Queen Christina, and as her Ambassador at Paris from 1635 to 1644 conducted to a successful termination long and

intricate negotiations with Cardinal Richelieu. In 1645 he visited Stockholm. On his return journey he was shipwrecked, and died a few days after at Rostock from the effects of cold and exposure.

We have already seen that with the decay of the supremacy of the Pope and the Emperor there had arisen a tendency to utter lawlessness in international affairs. This tendency was never more conspicuously exemplified than in the events that were taking place at the time when Grotius wrote. The Thirty Years' War had just begun. Germany was swarming with young adventurers, who hoped to win for themselves fame and fortune on her battlefields. Throughout the length and breadth of the land Catholic and Protestant were at one another's throats. Mansfeld and Christian of Brunswick were shewing how armies could be maintained by indiscriminate plunder, and other leaders were beginning to follow in their footsteps. Moved by the horrors around him, the great Dutch jurist strove to shew that there were laws entitled to make themselves heard even amid the din of arms. When explaining the causes which induced him to write he says in a passage which, though often quoted, will bear quotation again, "I saw prevailing throughout the Christian world a license in making war, of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason, and when arms were once taken up all reverence for divine and human law was thrown away, just as if men were henceforth authorized to commit all crimes without restraint¹." These words certainly do not overstate the case. The usages of war were so unspeakably horrible that there is nothing to be wondered at in

¹ *De Jure Belli ac Pacis*, Prolegomena, § 28, Whewell's Translation.

the fact that a good man should strive with all his might to bring about a reform in them. The marvel is that he should be successful. An exiled scholar, poor and friendless, with no other weapon than his pen, and no other resources than his undaunted spirit and marvellous learning, changed the current of European thought on the subject of international relations, and exorcised from warfare the worst demons of lust and murder.

This seems a sweeping statement; but an examination of history will shew its truth. The Thirty Years' War was raging when Grotius wrote, and his influence was never felt in the conduct of its campaigns. On the contrary their horrors influenced him to write. The next great cycle of warfare arose out of the general coalition against Louis XIV., and ran its course at the end of the seventeenth and the beginning of the eighteenth centuries, about fifty years after the leading principles of Grotius had been embodied in the Peace of Westphalia. His system was accepted by Western Europe between the time of the Thirty Years' War and the time of the War of the Spanish Succession. The result was shewn in a vast decrease of barbarity, and a vast increase of consideration for the welfare of the non-combatant populations. The camps of Mansfeld and Wallenstein were bandit holds. The camps of Marlborough and Villars were ordered cities. Now and again the old barbarity burst forth, as in the devastation of the Palatinate in 1688, and the laying waste of part of Bavaria in 1704. But in the main the new ideas prevailed; and the rules laid down by the great Dutch jurist were applied in that most practical of all practical affairs, the conduct of a great war. A comparison between the usages of the two periods we have mentioned will prove this to demonstration.

During the early years of the great religious struggle in Germany a sort of rough order appears to have been kept among the soldiers on both sides. Indiscriminate plunder was not allowed, though enormous contributions were levied on the towns and villages. Some attempts were made to enforce discipline and punish outrage, and the soldiers were generally maintained by the Sovereigns who employed them. In the matter of the treatment of the civil population military morality was extremely lax, but still it was not absolutely non-existent. The people suffered terribly from the exactions of the armies; but they were spared in the beginning the absolute ruin which was their portion afterwards. The first to set the evil example of supporting an army entirely by plunder was Count Mansfeld, a mere adventurer, who under the guise of zeal for the Protestant cause, fought for his own advancement. Unable to pay his troops, he ravaged the country wherever he was quartered. Other armies had devastated only the territories of their foes, his army plundered friend and enemy with perfect impartiality. It was not long before he had hosts of imitators. Christian of Brunswick proclaimed himself "The friend of God and the enemy of the priests," and broke all laws, human and divine, in the horrors he inflicted upon the unfortunate peasantry. Catholic and Protestant were both alike to his burning-masters and foragers. His troops destroyed what they could not use. His track was marked by ruined villages and blazing homesteads. But the discovery that an army could be maintained by plunder alone was too valuable to be left to the undisputed enjoyment of one side in the contest. It was soon utilized for the Emperor and the Catholics by the saturnine genius whose marvellous career has exercised as great a fascination for

poets and historians since, as the man himself exercised over the minds of his contemporaries. In 1625 Wallenstein offered to raise an army for Ferdinand, which should cost the imperial exchequer nothing. It was to be paid and fed by means of contributions levied on the districts which it occupied. The Emperor's scruples were overcome by the promise that strict discipline should be maintained, and no private pillage allowed. But in practice the system of Wallenstein was as oppressive as the license of Mansfeld. Robbery reduced to a science is simply robbery more thorough and far-reaching than before. The general might punish marauders guilty of more than usual cruelty, he might issue orders that the peasantry were not to be harshly treated, he might deprecate confiscations for the sake of religion, but his army was obliged to obey the law of its existence, and in truth he made no serious effort to restrain it. Ample funds were needed to support his own magnificence, and to provide the liberal pay he gave to those who served under him. The adventurers of all countries and all religions who flocked to his standard were not likely to err on the side of moderation. His troops ate up the country like a swarm of locusts. A cry of horror and indignation went up from the whole of Germany. Catholics were as loud in their complaints as Protestants. Tales were told in the Imperial Diet itself of peasantry reduced to feed upon leaves and grass, and mothers who in the madness of hunger had devoured their own children. Honest indignation against the man who was responsible for such atrocities as these, together with dread of his overmastering ambition and fear of his revolutionary ideas, produced the intrigue which drove him from his command in 1630, just as Gustavus Adol-

phus had landed on the coast of the Baltic. After a time the successes of the Swedish King brought about his recall with almost dictatorial powers and the right of unlimited confiscation. But again his exactions, his ambition, and his far-reaching plans, which the puny minds of the Emperor and his advisers could not comprehend, produced a universal coalition against him, and the great schemer was slain by his own officers on February 25, 1634.

Gustavus Adolphus occupies among the Protestant leaders in the war a place similar to that taken by Wallenstein on the Imperial and Catholic side. Yet the points of contrast between the two men are more numerous and more important than their points of resemblance. Alike in that they both possessed commanding genius, they were unlike in everything else, and especially unlike in their modes of waging war. Wallenstein maintained his armies on the plunder of the country; Gustavus made his soldiers pay for everything they took. Wallenstein cared naught about the behaviour of his men as long as military order and subordination was observed among them; Gustavus punished outrages with the utmost severity, and with his own hands dragged offenders before the provost-marshal. Wallenstein was entirely indifferent in religious matters; Gustavus was throughout his career a devout Lutheran. It was his whole-hearted devotion to a great religious cause, and his stern determination to keep the means he used as pure as were the ends he sought; that caused his few campaigns to shine forth in contrast with the rest of the war as a ray of light amid worse than Egyptian darkness. From the moment that he landed in Pomerania in 1630 till his death on the field of Lützen in 1632, he kept the

strictest discipline among his Swedes. Something of the fervour of the English Puritans animated his army, and made restraint comparatively easy to men who believed themselves the immediate instruments of the Almighty. The soldiers were regularly paid. Pillage and outrage were visited with prompt and terrible punishment. The country people were protected, and encouraged to bring their produce into the Swedish camp, where the market price was given for it. Wherever Gustavus went he was welcomed as a deliverer. He was almost adored by those who had suffered from the barbarities of Wallenstein's soldiers. Yet all the force of his matchless ability for command, joined with all the *prestige* of his almost uninterrupted success, was insufficient to restrain the German allies who joined his standard, after the sack of Magdeburg by Tilly's troops had taught the Protestant Princes of the Empire that their only safety lay in vigorous resistance to the Imperial power. In despair he summoned a meeting of his officers while he lay at Nüremberg in the early Autumn of 1632, and addressed them in words of eloquent reproach. After accusing them to their faces of robbery and cruelty, he added, "The very devils in hell are more loving and trusting one to another than you Christians are among those of your own country. My heart almost fails me, yea, my bowels yearn within me, as often as I hear complaint made that the Swedish soldiers are more merciless than the enemy. But they are not the Swedes, they are the Germans, that commit these outrages....The choler and the manhood that you have, score it, in God's name, upon the fronts of your enemies, but stain not the honour of a soldier by outraging unarmed innocence. Live upon your means like soldiers, and not by pilfering

and spoiling like highway robbers. This if you do not you shall ever be infamous, and I with such help shall never be victorious¹." We are told that these words drew tears from some of those to whom they were addressed ; but it is certain that they failed to effect any permanent improvement in the actions of the German allies of the Swedish hero. Indeed his own veterans began to be affected by the evil examples around them, and after his death in the following November they gradually deteriorated in conduct, till the disastrous battle of Nördlingen in 1634 destroyed all that was left of their ancient discipline.

The death of Gustavus Adolphus terminates the one episode of the war which it is possible to look upon without a shudder. His influence appears to have been the sole restraint upon military license ; and when it was removed the horrors grew ever darker and darker, until at last in 1648 the end came from the sheer exhaustion of all the combatants. It is worthy of remark that the solitary commander who was at once willing and able to keep his soldiers under control and protect the non-combatant population, was the only great soldier in the war of whom it is recorded that he was an enthusiastic admirer of Hugo Grotius. The words of the exiled Dutch jurist were to bear ample fruit in after-times. In his own day they influenced but one of the leading actors in the great contemporary tragedy, and that one was the only man among them all who played his part justly and mercifully, and kept his hands clean from the stain of innocent blood.

This is not the place to relate the history of the

¹ I have taken these sentences from the translation of the Swedish King's speech given in Hosack's *Law of Nations*, pp. 205, 206.

Thirty Years' War. All that can be given is a brief description of the terrible methods used in conducting it¹. It is impossible to imagine a more awful record of crime and misery. We have already seen how a short time after the struggle began, the armies, with the exception of those of the King of Sweden, had learned to live upon the country. In the latter years of the war the Swedes themselves were as great adepts at plundering and cruelty as were their Imperialist foes. To them is attributed the invention of a special form of torture called the Swedish Drink, which was a compound of the vilest liquids imaginable. The victim was forced to drink it till his body was distended with the vast amount he was made to swallow, and in this condition he was stamped upon till it ran out of him. The object of this and other atrocities was to extort from the unhappy persons who were subjected to them information as to the hiding-places where money or food was concealed. For as the country became more and more impoverished, increasing difficulty was felt in maintaining the armies; and the peasantry attempted with the courage and ingenuity of despair to retain for themselves at least enough to support a miserable existence. Hence the foul tortures to which we have alluded were freely practised upon them, and by degrees a terrible feud grew up between the country-people and the soldiers. Sometimes a village would be defended; but more often on the approach of a party of marauders the population took to the woods. There they were hunted down like wild beasts, outraged, and slain with every circumstance of fiendish cruelty. When opportunity offered they

¹ An account at once short, graphic and restrained is to be found in a volume of *Lectures on the Thirty Years' War* by Abp. Trench.

retaliated upon the stragglers. A general lost more soldiers from the boors in a retreat than he did from the enemy in a battle that went against him. The sick and the wounded, left behind by their comrades, experienced in their own persons the tortures they had inflicted in the day of their strength and power. Famine and pestilence followed in the wake of the armies. There was no pity, no reverence, no devotion. Wolfish ferocity, blasphemous impiety, unbridled lust, bore sway over the words and deeds of men. Whole districts went out of cultivation, and were restored to forest and wilderness. The wretched inhabitants, such of them as were left alive, formed predatory bands, and lived by robbery. Often the gibbets were deprived of their ghastly load to satisfy the pangs of hunger; and the churchyards were rifled for the same horrible purpose. Cannibalism was frequently preceded by murder. Human beings, turned by misery into wild beasts, rivalled the beasts in ferocity and foulness. Covetousness, too, was rampant, and nothing was secure from the spoiler. Even the abodes of the dead were ransacked in the search for treasure, and the mouldering bodies thrown out to the kites and the wolves. Men gloried in their wickedness. They chanted litanies of the devil, they sang songs in praise of lust and torture, they raged with especial fury against churches, priests, and pastors. In the remote country districts religion died; and learning perished from the Universities. As early as 1626 there were only two students left at Heidelberg; and when the agony was over the German language and literature bore traces of deterioration for many a generation. The war gradually attracted to itself whatever remained of life and vigour in the land. Ardent spirits joined the armies; others

became camp-followers, and ministered to the vice and riot of the soldiers. These disorderly swarms were a greater curse to the country than the troops themselves, and they were often four times as numerous. It is impossible to exaggerate the sufferings of the districts through which they passed. When in 1636 Lord Arundel travelled up the Rhine as English ambassador to the Emperor, he found at one place the poor people "dead, with grass in their mouths." At another the plague was raging, and men were dying at the rate of over thirty a day. At a third he sent food to the starving population, "at the sight of which they strove so violently that some of them fell into the Rhine and were like to have been drowned." Once the party dined in a village which had been plundered twenty-eight times in two years, and twice in one day. The whole record of their progress bears witness to the fearful havoc wrought in a region which when the war began was one of the richest and most populous in Europe.

But terribly as the open country suffered, the sufferings of the towns were more terrible still. The horrors of the sack of Magdeburg are universally known. But the importance of the place, and the dramatic circumstances of the siege, have given them a preeminence in evil which they do not deserve. Similar if not worse atrocities were perpetrated in other places. Indeed they were the ordinary incidents of a successful storm. The soldiers claimed unrestricted license as their due on such occasions. When one detachment of the besieging army was satiated with its orgies, it was withdrawn and another sent, till not a house was left unplundered or a woman unviolated. When all was over the surviving inhabitants were sometimes harnessed to the waggons which carried

away the spoil of their own homes. Occasionally they were stripped of their clothing, and driven absolutely naked in front of their retiring foes. In this state they might deem themselves fortunate if they were not hunted by dogs for the amusement of the soldiery, who sometimes varied the sport by gashing their captives with knives or piercing them with needles. The fugitives who escaped generally carried with them the seeds of pestilence to their place of refuge. Thus in 1637 Dresden lost half its inhabitants from the plague which was brought to it by those who had fled from Torgau. Even when a town surrendered on conditions, ransom had to be paid for everything within it; and often the siege itself was almost as destructive to human life as a storm would have been. Augsburg lost six-sevenths of its inhabitants in a siege which lasted seven months; and other towns were more unfortunate still, in that they were besieged several times in the course of the war.

The close of the struggle found Germany exhausted and ruined. No such warfare had been known in it since the Suevi boasted that six hundred miles of devastated territory formed a barrier between them and their nearest neighbours. Three-fourths of the population had perished. Three-fourths of the houses were destroyed, together with five-sixths of the oxen and nearly all the sheep. Large tracts of country had gone out of cultivation. On all sides the forests had increased and the beasts of the forest multiplied. Commerce had well-nigh disappeared. The great trading cities were shadows of their former selves. Some arts had perished entirely; and those which remained were in a state of decay. Manufacturing skill had been forgotten amid the ravages of warfare. Science and literature had

almost departed from the land. And worse than all other evils was the moral deterioration, and the want of national spirit and national enthusiasm. A generation that had grown to manhood in the midst of such an apocalypse of iniquity lacked the self-respect and the respect for others which are the necessary conditions of peaceful progress; and it also lacked conspicuously the patriotic feeling which is the foundation of national greatness. For two centuries or more Germany was merely a geographical expression. Her sons had first ruined her by their unholy quarrels, and had then stood by while the Swede, the Spaniard, and the Frenchman distributed her territories, and settled her political and religious constitution. Many ages were to pass away, the discipline of many a sorrow was to be endured, before the Fatherland could taste the blessing of unity, and its children take their proper place among the strongest and noblest of the nations.

The horrors of the Thirty Years' War were the natural result of the principles of Machiavelli applied in the field as well as in the cabinet. The old restraints were, as we have seen, no longer felt. The Emperor was one of the combatants. His authority was set at naught by his foes, and submission to it sat very lightly upon his friends. The Pope ceased to command the reverence which had previously been paid to him. The Protestants, of course, gave no heed to his decrees, and reviled his person and office. Many of the Imperialist generals cared little for the system of which he was the head, and which they were in arms to defend. Arnim was a Lutheran while he was in the service of the Emperor, as well as when he commanded the Saxon army. Numbers of Wallenstein's officers were Protestants. Wallenstein

himself once contemplated the plunder of Rome as a possible military operation. The war, which began as a great religious struggle, degenerated long before its close into a revolting exhibition of the worst passions which degrade humanity. The doctrine that in affairs of state moral rules could be set aside with impunity was easily applied to war. Machiavelli had taught that justice and good faith need not be observed by princes, if advantage was to be gained by violating them. Generals and soldiers carried his principles but one step further, when they concluded that the duties of mercy and self-restraint were of no obligation in the conduct of a campaign. When the old order had decayed, men were but too ready to believe a teacher who told them that they might dispense with any moral rules which did not seem advantageous at the moment. The Florentine statesman allowed this unholy freedom to the cool calculations of reason: the fierce hordes who devastated Germany took it for the ungoverned impulses of passion.

Let us now turn to the War of the Spanish Succession, and we shall look upon a very different picture. The heterogeneous armies commanded by Marlborough were kept in excellent order, and made as little burdensome as possible to the countries where they manœuvred and fought. On the French side, too, similar care was taken to maintain discipline and prevent excess. Villars was the most successful in this respect of all the Marshals of Louis XIV.; and he prided himself upon the orderly manner in which the contributions he levied were exacted, and the abstinence of his soldiers from pillage and arson. He based his conduct, it is true, upon considerations of enlightened self-interest, rather than upon the dictates

of humanity. "If you burn," said he to his troops, "if you madden the people, you will perish of hunger." But however mixed the motives, the practical result was most beneficial. For years the opposing armies confronted one another in the Belgian provinces and along the Rhine frontier; and yet the country was not devastated, nor were the towns destroyed. The pursuits of peace went on with only as much interruption as is inseparable from war. The peasant still tilled his fields, the artisan plied his craft, and the merchant sold his wares. Once only did Marlborough depart from his usual mildness, and that was when in 1704 he ordered the devastation of part of Bavaria. The act was excused at the time on the plea of necessity; and there is no reason to doubt that the English general spoke the truth when he said that it was contrary to his nature. Cruelty was never one of his vices. He had the French wounded carefully attended to after the battle of Malplaquet, and he punished with severity any excesses on the part of his soldiers. Throughout the war the country under military occupation was spared as much as possible. There was generally an agreement between the leaders on both sides not to exact from each locality more than a stipulated amount in contributions and requisitions. The assessments were made according to the means of the district, and if additional supplies were required they were bought at the market price. The soldiers received their pay with fair regularity, and they were generally well fed and well clothed. Thus the temptations to violence and pillage were greatly reduced, while the severe punishments inflicted upon offenders restrained any inclination to harry the unarmed population. Not only were non-combatants better treated than in any former war, but

the welfare of the troops themselves received far more attention. The generals looked after their comfort in the details of daily life; and when they were sick or wounded medical aid was forthcoming; though then, and for a long time afterwards, the surgery of the camp had a well-earned reputation for roughness.

Among the many causes which combined to produce these great improvements in the usages of warfare the foremost place should be given to the influence of Grotius. In opposition to the fashionable theory of his time he had declared that there were laws entitled to make themselves heard even amid the din of arms; and he had worked out a system of such laws immeasurably superior in point of morality to the evil customs of the day. Some of his leading principles were acted upon in the great European settlement that closed the Thirty Years' War. Soon after the peace his book was taught as Public Law at Heidelberg and Wittenberg. Puffendorf and other writers adopted the main outline of his system, and spread a knowledge of it throughout Western Europe. The nations were tired of bloodshed and rapine, and eagerly welcomed rules of warfare which put some check upon the passions of a lawless soldiery. We have seen, for instance, how mild was the treatment of non-combatants in the wars of Marlborough and Eugene, as compared with the atrocities inflicted upon them during the great German conflict. If we turn to the pages of *De Jure Belli ac Pacis*, we shall find it laid down that justice requires us to spare as much as possible those who have done us no wrong; and that goodness, moderation and magnanimity often command a wider mercy than strict justice would be inclined to grant. Old men, women, children, priests, husbandmen and merchants are specially men-

tioned as not being liable to destruction because they are necessarily harmless, and thus nearly all the unarmed population are, according to Grotius, to be spared the worst indignities¹. What he proposed on paper, the generals of the War of the Spanish Succession carried out in practice. His system gradually won for itself general recognition. At first its influence was felt more in warfare than in other matters, but in time it leavened the whole theory of international conduct. In discussing its nature we shall, I think, discover the causes of its success.

When a number of states no longer own even in theory a common superior, the most obvious mode of escape from lawlessness in their mutual dealings seems to us, with our present ideas, to be the regulation of their conduct towards one another by rules to which all have assented. But it may be doubted whether International Law in the modern sense would ever have existed, had general consent been supposed to be necessary before its commands could claim obedience. As a matter of fact their obligation was based partly upon consent, and partly upon a theory of the extreme sanctity attaching to the precepts of a so-called Law of Nature. The great exploit of Grotius and the early publicists was to apply this Law of Nature to the intercourse of states, and thus fill up the gap caused by the disappearance of the conception of universal sovereignty.

Few products of human thought have had a more marvellous history, or a more potent influence, than the theory of a Law of Nature. Born of the subtle intellect of ancient Greece, it became the fundamental doctrine of

¹ *De Jure Belli ac Pacis*, Bk. III. ch. XI.

the Stoical philosophy, and then passed to Rome, where it transformed the jurisprudence of the republic, and was the great agent in elaborating the noblest legal system the world has ever seen. Once woven into the texture of Roman Law, it spread wherever the influence of that Law extended; and everywhere the powerful class of lawyers and jurists were its most influential advocates. Altering somewhat its form as time went on, it became one of the humanizing influences of the middle ages; it called into existence modern International Law; it supplied the theoretical justification for the revolt of the American Colonies of England; and it was the very gospel of the French Revolution. Of late years it has become discredited under the attacks of the analytical school of Bentham and Austin, and the historical school of Sir Henry Maine. But it still retains considerable vitality; and a most convincing proof of its influence was afforded by the Geneva Arbitration of 1872, when the majority of the arbitrators mulcted Great Britain in heavy damages, mainly, though not entirely, on the strength of rules which were not deduced from the practice of nations, but evolved by them from their own notions of the equities of Natural Law.

At the end of the sixteenth and the beginning of the seventeenth centuries belief in a Law of Nature was universal among educated men. The revival of learning greatly extended the influence of the theory, and its connection with Roman Law made it one of the favourite conceptions of jurists. All who thought at all upon legal and political subjects believed that there had once existed on the earth a time when organized communities were not yet formed, and each individual was at liberty to do what was right in his own eyes, unrestrained by human

laws. It was further held that men in such a condition obeyed certain rules discoverable by their own unassisted reason. These rules were called Laws of Nature, because they were implanted by nature in the breast of each human being, and were not dependent for their obligation upon the sanctions of any external authority. Opinions differed not only with regard to the particular details of Natural Law, but also as to its general character. No two descriptions of the State or the Law of Nature were exactly alike; but nevertheless it was asserted with the utmost confidence that "the principles of Natural Law, if you attend to them rightly, are of themselves patent and evident, almost in the same way as things which are perceived by the external senses¹."

Yet when writers like Grotius based Natural Law upon the social instincts of man, and his capacity for apprehending and acting upon general principles, while Puffendorf and his followers held that it rested upon the commandments of God, and a third school, of whom Hobbes was the chief, denied altogether the existence of natural benevolence, and asserted that the State of Nature was a state of mutual war, it might be supposed that some doubt would arise about the existence of a law whose chief interpreters could not agree as to its basis and leading principles, or at least that the inquiry into its character and details would have been regarded as far too recondite for the mind of uncivilized man. But no such difficulty appears to have been felt by the jurists of the seventeenth century. With one consent they sang the praises of Natural Law; and though they agreed upon nothing else with regard to it, they held unanimously that

¹ Grotius *De Jure Belli ac Pacis*, Prolegomena § 39.

all whose minds were not perverted by vice or sophistry could easily find out its commands for themselves, since, as they said, it was written in the hearts of men.

Now it is obvious that this theory is open to attack on two separate grounds. Historically it is false, and philosophically it confounds what is with what ought to be. There never was a time when men lived each his own individual life without connection with his fellows, and without any external authority to which he owed obedience. The more we discover about early institutions, the more clear does it appear that the unit of ancient society was a community, not an individual. Instead of primeval man being absolutely free to follow his own impulses and determine his own lot, he was subject to far more numerous and more galling restrictions than is the case in modern life. Indeed, the progress of civilized society is a progress from a state in which nearly all men have their rights and duties absolutely determined for them, to a state in which they are at liberty to determine most of them for themselves. This is nowhere more clearly exemplified than in the department of contract. The theorists on a Law of Nature imagined that all the rights and obligations of early man were created by mutual consent. In the supposed absence of any controlling authority, they could think of no other foundation for them. Puffendorf bases even the authority of parents over children on a presumed consent of the infant at the time of its birth¹! But Sir Henry Maine has clearly shewn that the contracts of early society were few and far between, that they were accompanied by a most intricate ceremonial, and that the attention of the law was con-

¹ *Whole Duty of Man*, Bk. II: ch. III.

centrated not on the intent of the parties, but on the detail of the ceremonial¹. Any defect or error in it vitiated the whole transaction, whereas if it had been properly performed no mistake as to the intention of either side had the slightest invalidating effect. The advocates of Natural Law were completely astray both in the principles and in the details of their systems. Instead of finding out by historical investigation the characteristics of early society, and the nature of the rules observed by primitive man, they resorted to a series of guesses; and unfortunately for them most of their guesses were not only inaccurate, but the very reverse of the facts. They stripped man of all the outward habits and observances of civilized society, and then endowed him with all the thoughts and feelings which long centuries of civilization have combined to produce. Having thus obtained as their primitive man an anomalous and impossible creature, they imagined the rules which he would be likely to lay down for his own conduct in the primeval woods, and gave the results of their imagination to the world as precepts of the Law of Nature.

In addition to the historical defects of the theory, it is open to the philosophical objection that it confuses together the actual and the ideal, what is and what ought to be. We never know whether its advocates are telling us what they conceive men ought to do, or describing what men actually do. If it be meant for a system of ethics, well and good. We can examine it and criticize it, just as we might any other theory. But if it be meant for imperative law, all we can say is that it can be nothing of the kind; for it never existed as a body of rules known

¹ *Ancient Law*, ch. ix.

and received among men. It is but a collection of more or less able opinions as to the proper method of regulating human conduct.

But fallacious as is the theory of a State and a Law of Nature, it nevertheless conferred a great benefit upon mankind when it gave currency to modern International Law. We have seen how the old doctrine of universal sovereignty gradually decayed, and was finally overthrown in the great conflict of the Reformation. The years which elapsed between the revolt of Luther against the Papacy in 1520 and the Peace of Westphalia in 1648 witnessed the death-throes of the old state system of Europe and the birth-pangs of the new. The theories that took shape and form in the system of Grotius had been as it were in the air for a long time. They finally won universal acceptance at least as much through the decay of all rival theories as by their own intrinsic excellence. When the changed conditions of international intercourse in Europe were rendering the old ideas more untenable day by day, the discovery of America brought forward a new set of problems, which mediæval principles were wholly incompetent to solve. It is not, therefore, to be wondered at that the earliest expounders of new views were Spaniards, since that nation was first brought face to face with the questions arising out of the conquest and colonization of portions of the New World. After the Spanish school came Albericus Gentilis, the greatest of the forerunners of Grotius. His book *De Jure Belli* was published in 1589. From it Grotius took a very considerable portion of the ground-plan and arrangements of his own great work. Indeed his obligations to its author are so extensive that his right to the title of Father of International Law has been seriously questioned. But

however much Grotius may owe to Gentilis, it is impossible to forget that the former changed the course of European thought on the subject of international relations, whereas the latter scarce stirred a ripple on its surface. Gentilis came at a less favourable time than his great successor. But though circumstances conspired to assist Grotius, his work would not have produced the effect it did, had he not been well fitted by his marvellous learning, his eloquence, and his humanity, to charm and convince his age.

The great Dutch jurist gathered up into one harmonious whole the various existing elements of a new order in international affairs. He gave shape and symmetry to ideas that had before his time been fugitive and barren; and he worked out into a detailed system of rules the principles he arranged and expounded. The causes of his great success, other than the intrinsic excellence of his work, were two. One was the universal belief in a Law of Nature, and the other the horror felt by all but the vilest of mankind at the unutterable atrocities of the Thirty Years' War. A system which promised to soften the ferocity of contemporary warfare, and at the same time fell in with received ideas as to the sanctity of the Law of Nature, was sure of a favourable reception, if only it were worked out with ability and judgment. Grotius had both in no small degree; and thus the rapid and permanent success of his work is explained and accounted for.

We have now to discover how he utilized the theory of Natural Law, and made it the mother of a new and better system of International Law. His method was as follows. Seeing that nations had no longer even in theory a common superior, he argued that they were in

a position similar to that of individuals before civil government was established among them. Just as men in such a position were bound by a Law of Nature, so also were states. Natural reason dictated certain rules which were so sacred and immutable that even the Almighty could not alter them. They were part of the very nature and essence of things, and God Himself submitted to be judged by them¹. These rules bound states as well as individuals, and were the basis of International Law. The practice of all or of most nations could add to them, or go beyond them, but it could not repeal them. They were the immutable part of International Law, whereas the part based upon general consent could vary from time to time. In order to discover what these rules of Natural Law were Grotius employed all the resources of his enormous erudition to collect together the opinions of poets, orators, philosophers, historians, and lawyers. These he gathered from all ages and all nations, and used their testimony as evidence both of Natural Law, and of that part of International Law which rested upon general consent; for, argued he, these opinions when unanimous "must be referred to some universal cause; which, in the questions with which we are here concerned, can be no other than a right deduction proceeding from the principles of reason, or some common consent²." When they were "deduced from certain principles by solid reasoning" they were evidence of the Law of Nature; and when they could not be referred to fundamental notions, they must originate "from the will and consent of all." Thus the same kind of testimony was used to shew what were

¹ *De Jure Belli ac Pacis*, Bk. I. ch. I. § 10.

² *De Jure Belli ac Pacis*, Prolegomena, § 40, Whewell's Translation.

the precepts of Natural Law as applied to states, and what were the rules of that portion of International Law called by Grotius the Positive or Instituted Law of Nations. How then were the two to be distinguished? By the character of the rules themselves, says Grotius. He thus escapes the reproach of slavish deference to his authorities, and assigns to that natural reason which, according to him, guides every man in such matters, the task of recognizing a Law of Nature when put before it. His International Law has two sources, the Law of Nature and the consent of all or of most nations; but the latter is only supplementary to the former, and cannot ordain anything contrary to it.

In elaborating the rules which govern the intercourse of states Grotius was led to adopt into his system a vast amount of pure Roman Law. The later Roman lawyers divided their law into a *Jus Civile* peculiar to Rome, and a *Jus Gentium* common to Rome and other states; and with the single exception of Ulpian they identified the *Jus Gentium* with that *Jus Naturale* which their profession of the Stoic philosophy caused them to believe in. Grotius, seeing this, thought he had discovered in the Roman *Jus Gentium* an international code of antiquity, based upon ideas similar to his own of the applicability of Natural Law to the intercourse of states. He was, however, mistaken in so far as the strict technical meaning of the phrase is concerned, though it seems to have been used by Livy and other historians in a loose and popular sense to signify such usages as all mankind followed¹. The *Jus Gentium* of the classical jurists was

¹ For an examination of the views of modern scholars on this subject see an Article on *Jus Gentium* by Professor Nettleship in the *Journal of Philology*, Vol. XIII., No. 26.

that portion of Roman municipal law which was common to Rome and other states, and which was free from the intricate formalities and cumbrous ceremonial of which the *Jus Civile* was full. When the Roman lawyers became converts to the Stoic philosophy, they regarded their own *Jus Gentium* as a portion of the lost code of Nature, and dignified it for the future by the appellation of *Jus Naturale*. Thus it is not to be wondered at that Grotius imagined their *Jus Gentium* or *Jus Naturale* to be a system of rules for guiding independent states in their mutual intercourse. To a mind like his, full of the notion of Nature and her law, both names would be misleading. His mistake was a very natural one to make; and it certainly was the means of introducing into International Law a large number of rules and principles of which it stood sorely in need.

For whilst the mediæval order was breaking up in Europe, the discovery of the New World had pushed to the front problems which had been unknown before, and which the old ideas were quite inadequate to solve. They were capable of giving some sort of answer to questions concerning the transfer of territorial rights by conquest, the effect of the cession of territory by sale or gift from one potentate to another, the mutual rights and duties of suzerain and vassal, and others of a similar kind; though, as we have already seen, even on this familiar ground their solutions were becoming day by day more inapplicable to the altered circumstances of Europe. But they were wholly unable to resolve such disputes as were then beginning to arise between the great discovering and colonizing nations with regard to the boundaries of their respective settlements, and the extent of the rights gained by their navigators. Matters

of this kind had never come up for settlement in the Europe of the middle ages, because all the territory with which the rulers of that period had any practical concern was already possessed by states sufficiently civilized and organized to be considered capable of entering into international relations. Now that they had arisen in consequence of the discovery of a new continent, and the immense impetus given thereby to enterprise of all kinds, they required new principles to settle them. These Grotius found in those rules of the Roman *Jus Gentium* which dealt with what were called Natural Modes of Acquisition. The Roman lawyers classed together as *res nullius* things which never had an owner, and things which were abandoned by their owners, and they laid down that the natural mode of acquiring such things was (by *Occupatio*, under which term they included both the physical act of seizing the thing, and the mental act of intending to hold it as one's own. Among the things which they reckoned as *res nullius* were islands rising in the sea¹. Here then was an instance of a rule of Natural Law directed towards the settlement of proprietary rights in newly-formed and newly-discovered territory; and it was easy to apply it to the controversies that were agitating Europe. Thus what was originally meant to regulate private ownership amid the complicated conditions due to the volcanic soil of ancient Italy, was finally used to determine the nature and extent of state sovereignty in the vast lands that were being revealed to the old world by every new explorer². The rights of the natives were subjects of controversy among publicists and theologians, but in practice they were habitually dis-

¹ Justinian, *Institutes*, Bk. II. Tit. I. § 22.

² *De Jure Belli ac Pacis*, Bk. II. ch. III. §§ 1—4.

regarded. The New World was parcelled out among the chief maritime states of Europe without the slightest regard to the wishes of its original inhabitants, and a new chapter on the subjects of discovery and colonization was added to International Law.

But the influence of Roman Law upon the system of Grotius was by no means confined to that portion of his subject which dealt with the question of occupation. It pervaded the whole of his work, and is constantly to be traced in the most unlikely places. The notion that the Law of Nature should regulate the intercourse of states, coupled with the belief that the *Jus Gentium* of the Romans was a code of Natural Law elaborated for that very purpose, caused him to borrow freely from the classical jurists in both the principles and the details of his system. Within the Germanic Empire those rules of Roman Law which set forth the power of Cæsar and the obligations of others to him, had been accepted by statesmen and jurists during the reign of the old idea of universal supremacy. Now that the notion of a common superior for states had been exploded, Roman Law still influenced international transactions even in a greater degree than before. But a fresh portion of that law was the operative force in the new European order. The *Jus Gentium*, regarded as a Natural Code, was applied to the relations of states, because it was believed they stood to one another as men were supposed to stand in a state of nature. One of the most important effects of the change was to extend and intensify the conception of territorial sovereignty, and another was to give effect as a legal doctrine to the principle of the absolute independence and equality of states.

The idea of territorial sovereignty was introduced into

International Law by Feudalism. But as long as the theory of a common superior over states remained, territorial rights could not be carried to their full development. The power of the Suzerain was always present to qualify the rights of the immediate lord of the soil. When, however, feudal and imperial ideas vanished, the sovereignty claimed by each ruler over his people's land became a much more real thing than before; and the application of the *Jus Gentium* to international affairs greatly extended the influence of the conception. Roman Law recognized absolute proprietorship as the true type of dominion, though the possession of a greater or less interest in soil owned by another was not altogether unknown under it. Still such a limited interest in land was regarded as exceptional, whereas under the feudal system it was the ordinary form of ownership. The work of Grotius in substituting Roman for Feudal ideas took away from the notion of territorial sovereignty all the limitations with which it had previously been surrounded, in spite of the fact that he himself argued strongly against the doctrine that all kings and rulers could alienate territory at their pleasure¹. In practice these restrictions had not amounted to much, but still their existence had been some little check upon the caprice of rulers. For the future, sovereigns were regarded not merely as owners, but as absolute owners, of the state's territory. No matter what might be the restrictions imposed upon their power over the soil in dealings with their subjects, in dealing with other sovereigns they were absolutely unfettered. They could cede provinces and partition kingdoms, without the

¹ *De Jure Belli ac Pacis*, Bk. I. ch. III. §§ 12—15; Bk. II. ch. VI.

slightest regard to the wishes of either superiors or inferiors. A king who had no legal power to wrest an acre of ground from his meanest subject, might, according to the law and the practice of nations, cede to another king a territory on which millions of his people lived without once consulting them with regard to the transfer. He need take into account no other will than his own, because in the eye of International Law he was regarded as absolute owner of the whole territory of the state. It can hardly be denied that this simplification of the conception of territorial sovereignty by taking away from it all qualifying elements, greatly assisted the development of autocratic notions of government, and helped to bring into full activity that theory of a Balance of Power, which has been as prolific a parent of bloodshed and misery in Europe since the Peace of Westphalia as were religious disputes in the previous epoch. Kings came to regard their territories as so many pieces in a game of skill. Europe was the board, its sovereigns the players, and individual aggrandizement the object of the game. Each fought for his own hand. If one seemed likely to become too powerful, the others combined against him, not in order to insist upon good government, or to rescue populations from a yoke which they abhorred, but to preserve the European equilibrium, or, in other words, to keep a skilful or unscrupulous player from amassing so many pieces that he would be able to overwhelm his adversaries in detail. Most of the heritage of Roman Law with which Grotius endowed the International Code was a decided benefit to humanity, but it may well be doubted whether in this particular instance the loss has not outweighed the gain.

From what has been said before with regard to the

decay of the old theory of a common superior, owing to the inability of either Pope or Emperor to command universal obedience, it will readily be inferred that any system of International Law likely to find acceptance with the men of the seventeenth century would be obliged to postulate as its fundamental principle the complete independence of each sovereign state. But it is by no means so clear that absolute equality before the law was also a necessary postulate. Indeed the tendencies of the age would have been best reflected in a system which graded international units according to their power and their form of government. Grotius knew, from his own experience and that of his friends, how difficult it had been for the States General of the United Netherlands to obtain for their ambassadors equal rank with those of kings, and how vast a gap there was in the estimation of the leading monarchical nations of Europe between themselves and Republics however powerful. But he and his fellow-labourers made the equality as well as the independence of states part of the foundation of their system. They expressly rejected the dominant authority of the Holy Roman Empire, and they gave the right of legation to all sovereign states¹. They were in truth under an intellectual necessity for doing so. Their minds were permeated by the belief that the Law of Nature was applicable to international concerns; and as no inequality was recognized among the subjects of that law, it was clear that states must be regarded as absolutely equal in rights and obligations, however great might be the differences in their power and area. Here again Roman Law gave precision to a theory which had

¹ *De Jure Belli ac Pacis*, Bk. II. ch. IX. § 11; Bk. II. ch. XVIII. § 2.

been introduced independently of it. The classical jurists laid down again and again that by nature all men were equal, and one of their great objects in elaborating the *Jus Gentium* was to sweep away all the intricate distinctions between man and man of which the *Jus Civile* was full. Thus Grotius in borrowing from the *Jus Gentium* under the impression that it was meant to be a code of nature applied to states, found ample confirmation of the theory of equality. He made it a cardinal point of his system; and thereby conferred no small benefit upon mankind. Europe adopted the doctrine, chiefly because it was a corollary of the propositions that Natural Law exists, and that it governs the intercourse of states. Both these statements commanded enthusiastic and universal assent, and therefore what seemed a necessary inference from them was received with general acceptance. Those who understand how strong was the tendency to the opposite theory in the minds of the great kings and statesmen of the seventeenth century, will admit that few greater speculative triumphs have ever been achieved. It is certain that few have been productive of more good. States have not invariably acted up to the theory of the code which they profess to obey. Wanton disregard by the strong of the rights of the weak has been by no means unknown in modern Europe. But the theory of the equality of all states before the law has always exercised a restraining influence. It has given small states an admitted principle to appeal to when they are wronged; and has fostered the growth of an international public opinion against high-minded aggression. Such an opinion very often results in action, and few powers care to run the risk of a disapproval that may take the form of armed assist-

ance to their victim. There are not wanting indications that the principle of absolute legal equality has done its work, and is about to be superseded by a different doctrine. The influences that seem tending in this direction will be discussed in the next Essay. It is sufficient here to point out how the theory of equality became part of the foundation of modern International Law, and how great an influence for good it has been.

We have now run through the cardinal points in the system of the early publicists, and are in a position to bring them together in one comprehensive view. Modern International Law, of which Grotius must be considered the father, was in its origin an attempt to find a working substitute for the exploded theory of universal supremacy. It obtained rapid and complete success because it pressed into its service the generally received doctrine of the existence of a State and a Law of Nature. It set forth that since states had no common superior they were in the same condition as men before civil governments arose, and like them were ruled in their mutual intercourse by Natural Law. Natural Law postulated the equality and independence of those who lived under it, and therefore all fully sovereign states were equal and independent. Sovereignty was territorial, because Natural Law, as interpreted in the Roman *Jus Gentium*, held each individual unit among its subjects to be absolute owner of the soil which belonged to him. The notion that the *Jus Gentium* was an international code of antiquity based upon the Law of Nature, brought about a wholesale adoption of its rules, especially those which regulated proprietary rights; and thus modern International Law was filled with principles and details taken directly from the legal system of ancient Rome. We see therefore

that Grotius reared the magnificent fabric of his system on the foundation of a double mistake. It was a speculative error to suppose that the so-called Law of Nature was a positive code actually existing among men; and it was an error of fact to suppose that the *Jus Gentium* was regarded by the Roman lawyers as a body of rules for the settlement of disputes between nations. Yet had it not been for these errors it is difficult to see how he could have found materials for the construction of his system, and it is certain that if it had been constructed it would never have been received and acted upon. Afterwards, when clearer thinkers came to see that the State of Nature was a beautiful myth, and the Law of Nature an untenable theory, and it was shewn that the *Jus Gentium* was a portion of Roman municipal law, the intrinsic excellence of the Grotian fabric preserved it from destruction. And moreover Grotius himself had provided, in his doctrine that states were bound by rules which had received the assent of all or most of their number, a support for his system when the foundations on which he most relied were taken away¹. For when once his rules had been generally received they were on his own theory binding, as long as they did not contravene plain precepts of Natural Law. Thus modern International Law has continued to advance on the lines laid down by the great Dutch jurist, though the speculative basis of his theory no longer commands the enthusiastic assent of civilized thought.

We can illustrate his work by supposing that mankind were made to believe to-morrow that the movements of the leaves of a certain wood conveyed to them precepts

¹ *De Jure Belli ac Pacis*, Bk. I. ch. 1. § 14.

which they were bound by all that was sacred to obey. Then the man who, himself believing this as thoroughly as any, should in all good faith interpret for the others the rustling of the mystic boughs into a code of morality far higher than any at present adopted, would do an immense service to the community, in spite of the fallacy on which his reasoning would be based. And in time to come it might well happen that he would be venerated for his noble sentiments, and honoured as an intellectual giant for the ability with which he systematized and arranged them, while nevertheless the theory of the inspiration of the leaves was still held by few or none. Something similar to the position of this hypothetical man is in sober reality the position of Grotius. He interpreted the untenable theory of a Law of Nature into an international code far better than any which preceded it; and those who believe least in his speculative doctrines, nevertheless revere his name, and hold the practical part of his work in the highest honour.

The progress of the new principles was clearly shewn by the Peace of Westphalia in 1648. It was the first of a series of great international instruments which have regulated the state system of Europe down to our own time. It recognized the independence of each separate state, even within the boundaries of the Empire. The principles of the territorial character of sovereignty and the equality of states before the law were involved in the arrangements that it made. The cruel customs of warfare in vogue when Grotius wrote were rapidly superseded by the humaner precepts he laid down. His appeal to the Christian spirit of mercy and love was not made in vain. Men came to spurn the immoral sophistry of Machiavelli, and to believe that there was a rule of

right to guide them in the council chamber and on the battle field, as well as in the ordinary concerns of daily life. Since 1648 International Law has had no rival system to contend with. It has been enriched by many new rules; and some of its original precepts have given place to others deduced from the changed practice of modern times. It has altered somewhat in the process of growth; but the continuity of its life has never been broken; and any change that may take place in its principles seems likely to be slow and gradual. In spite of modifications and additions, it stands to-day the same in all essentials as Grotius left it in 1625. One of its prominent features will probably soon cease to exist¹, but in other respects it seems likely to endure, an unimpaired monument of the learning and humanity of its author.

¹ I refer to the principle of the Equality of States. In the next Essay will be found my reasons for believing that it is rapidly becoming obsolete.

ESSAY V.

THE PRIMACY OF THE GREAT POWERS.

THE doctrine that all completely sovereign states are equal before the law has scarcely ever been challenged since the days when Grotius made it one of the fundamental principles of his system. It has always been admitted that the more powerful a state is, the more influential it will be; but it has been asserted at the same time that superiority in power and influence can confer no legal preeminence. The smallest and weakest of independent political communities has, so it is said, exactly the same rights in International Law as the strongest and most extensive empire. We have seen in the previous Essay that this theory of equality was for a long time a great source of good in transactions between states. It tended to save the weak from becoming a prey to the strong, and arrayed the public opinion of nations on the side of justice to those who were unable to secure it for themselves. It did not prevent high-handed wrong, but it made aggression more difficult. When helpless powers were wantonly attacked, it was at least necessary to invent some plausible excuse—to make believe that they had wronged their stronger neighbours, even if they were quite innocent of offence.

Thus a certain amount of respect for law was kept up in the midst of transactions which were in reality lawless.

But with all deference to the many and great authorities who still repeat that the equality of states is one of the foundation principles of International Law, I venture to hazard the assertion that the doctrine has done its work, and is rapidly becoming obsolete. Publicists adopt too easily what they find in the works of their predecessors. Each age differs from the preceding age in its views of justice and utility as applied to international affairs, and the change in its opinions is reflected in the conduct of its wars and its diplomacy. A principle is not necessarily true to-day because it is to be found in Puffendorf and Vattel, and every publicist who has written since their time. It requires to be tested by the events of the present age, before it can be accepted as a part of modern International Law. The rules which states obey in their mutual relations are ever growing with the growth of opinion, and changing with the changes of usage.

If, then, the principles and rules of the law of nations are really to be deduced from the practice of nations whenever that practice is consistent and uniform, it is time, I think, to give up the doctrine of equality in deference to the stern logic of established facts. For many years Europe has been working round again to the old notion of a common superior, not indeed a Pope or an Emperor, but a Committee, a body of representatives of her leading states. During the greater part of the present century England, France, Austria, Prussia and Russia, have exercised a kind of superintendence over European affairs under the name of the Great Powers, and in 1867 Italy was invited to join them. An exami-

nation of the history of a few important international transactions will shew the growth of what is called the Concert of Europe, and will enable us to discern in some degree the nature and limits of its functions. It will at the same time reveal to us a difference in kind as well as in degree between the rights of sovereign states under modern International Law.

The origin of the present Concert of Europe, which means nothing more than the agreement of the Great Powers, may, I think, be traced back to the coalitions against Revolutionary and Napoleonic France, and chiefly to the treaty of Chaumont, which was drawn up under the influence of Lord Castlereagh, and signed on March 1, 1814, by England, Russia, Austria and Prussia, in the midst of the campaign which ended in the occupation of Paris and the first dethronement of the French Emperor. By it the four powers agreed that if France refused the terms which were then being offered to her at the Congress of Chatillon, they would form an offensive and defensive alliance for twenty years with a power of renewal. No peace was to be made except by common consent. The contingents to be furnished for the war were fixed; and it was also agreed that after peace was concluded each of the allies was to stand pledged to send 60,000 men to the assistance of any of their number who might be attacked by France. These stipulations created a great union for warlike purposes; but the principle of common resolution and common action was extended by secret articles of the treaty to the solution of the questions which would be raised when the time came to make peace. The powers agreed upon the general outline of the policy they afterwards carried out at the Congress of Vienna. Switzerland was to have her

independence and neutrality guaranteed by Europe. Holland and Belgium were to be united into one Kingdom under the house of Orange. The various states of Germany were to be joined in a Confederation; and Italy was to be parcelled out into a number of separate Sovereignities. In order to give effect to those arrangements the high contracting powers agreed to keep adequate forces in the field for a year after the conclusion of a definite treaty of peace. It is evident, therefore, that they were determined to make their decisions respected.

If the Treaty of Chaumont stood by itself as an isolated agreement, made to serve a specific purpose, and forgotten as soon as that purpose was fulfilled, it would differ in no respect from scores of similar treaties, which have defined the policy and settled the terms of a temporary league of independent states. But in its case the attendant circumstances are peculiar; and they give it a unique position. It was preceded by a general coalition of all the Great Powers, save of course France, to deliver Europe from the dominion of Napoleon Bonaparte. It embodied the final determination of the statesmen and Sovereigns of the time to lay aside their jealousies, and unite in a mighty effort to destroy the aggressive power of the French Emperor, and settle the territorial distribution of Europe in such a way as to prevent for the future the predominance of any single state. For twenty years all separate interests were to be merged in this common purpose, and the further duration of the league was expressly contemplated as possible and under certain circumstances desirable. The complete overthrow of Napoleon in 1815 relieved the Great Powers of the common danger which was their real bond of union; but in

spite of serious disagreements among them the principle of common action survived the occasion which brought about its adoption, and though it has been applied in a very different manner from that contemplated in the Treaty of Chaumont, it has remained ever since one of the accepted doctrines of European polity.

The military operations of the allies in the winter and early spring of 1814 were crowned with complete success. Bonaparte was removed to Elba, and Louis XVIII. restored to the throne of his ancestors. The Treaty of Paris, which was signed on May 30, marked the formal beginning of what was hoped would be a new era of peace and prosperity. It stipulated for the carrying out of the schemes of territorial distribution contained in the secret articles of the Treaty of Chaumont, and left all matters of detail to be dealt with by a Congress, which was to meet at Vienna in the fall of the year. France received her frontiers of 1792 : and a secret treaty, signed at the same time as the public one, established the principles that the four Great Powers should settle the destination of the territory conquered from her, and that it should be so distributed as to strengthen the lesser states on her borders.

When the Congress of Vienna met there was undisguised jealousy on the part of the other states of Europe of the four powers who had signed the Treaty of Chaumont. It was thought that their representatives alone would constitute the Congress; but the skill of Talleyrand gained for France admission to the council table, and thus enlarged the scope and altered the character of the concert of the leading powers of Europe. Representatives of Spain, Portugal and Sweden were also allowed to share in the deliberations. The envoys

of other states had merely the right of being present at Vienna, and making known the wishes of their respective masters. But though three of the secondary states had thus obtained a place in the European council, it was soon seen that their influence was by no means commensurate with the exalted position they had reached. When the Congress came to resolve itself into committees for the purpose of preparing the most important questions for the final decision of the whole body, the destination of the territories conquered from France was left, according to the secret Treaty of Paris, to the disposal of the four Great Powers which had entered into the final league against her. Talleyrand did his best to break up this arrangement, and on one occasion he obtained a conspicuous success. A difficulty arose as to the extent of Saxon territory to be ceded to Prussia. As Saxony had been conquered by the allies it was proposed to leave the matter to the four powers; but Talleyrand threatened to depart from the Congress unless France was joined with them, and with the support of England he carried his point. The influence of France was greatly enhanced by the disagreement which broke out between England and Austria on the one side, and Russia and Prussia on the other, with regard to the reconstitution under the Emperor Alexander of Russia of the ancient Kingdom of Poland. So serious did the divergence in the views of the powers become that at one time a breach seemed imminent, and a secret treaty of alliance against the two northern states was actually signed by England, France and Austria. Fortunately a peaceful settlement was arrived at; and the chief result of the long and stormy negotiations which had taken place was to give to France a better position at the

European council table. Thanks to the distinguished ability of her plenipotentiary, her voice was heard with respect in all discussions, and her will became an important factor in the solution of all difficulties ; while the other states who had been admitted to the Congress on the same terms did little more than ratify the decisions which the five powers had previously come to among themselves. In truth the exclusion of France from any system of managing European affairs by agreement between the leading states was unnatural and artificial. Her power was far too great to be disregarded, even after she was deprived of the conquests of the revolutionary epoch. At the time of the Congress of Vienna she was under a ban as the wanton disturber of peace, the plunderer who had just been made to restore vast accumulations of ill-gotten spoil. As soon as the new order was settled it was evident that she must take her place in the European Concert on equal terms with the four powers of whom she was the peer in strength, and influence, and historical importance.

These considerations weighed with the statesmen of the allies at the Congress of Aix-la-Chapelle, convened in 1818 to provide, among other things, for the evacuation of the territory of France by the army of occupation which had held portions of it since the battle of Waterloo and the second downfall of Napoleon. They were also anxious to give strength at home to the government of Louis XVIII. by shewing that it inspired confidence abroad. Since the principal subject-matter of the deliberation of the powers concerned France most intimately, a French plenipotentiary was summoned to the Congress along with the representatives of England, Russia, Prussia and Austria. The smaller states who had shared in the

counsels of Europe at Vienna were not admitted on this occasion, and at no subsequent period have they recovered the position they then lost, though Spain has recently made an attempt to do so. But while the four allied powers dispensed with the co-operation of neighbours greatly inferior to themselves in strength and influence, they took measures for the formal introduction of France into their league. At the instance of Great Britain they addressed a note to the French Minister for Foreign Affairs, inviting his Government to join for the future in all their deliberations for securing the peace of Europe. The Cabinet of Louis XVIII. accepted these overtures with joy; and on November 15, 1818, the agreement of the five Great Powers was embodied in a secret protocol, which was signed by a representative of each. It ran as follows :—

“1. The Sovereigns whose ministers are undersigned are determined never to deviate, neither in their mutual relations, nor in those which unite them to other states, from the principles which have hitherto united them, and which form a bond of Christian fraternity, which the Sovereigns have formed among themselves. 2. That this union, which is only the more close and durable that it is founded on no separate interests or momentary combination, can have no other object but the maintenance of the treaties, and the support of the rights established by them. 3. That France, associated with the other powers by the restoration of a Government at once legitimate and constitutional, engages henceforth to concur in and can alone secure its duration. 4. That if to attain these ends the powers which have concurred in the present act should deem it necessary to establish different reunions, either among the Sovereigns themselves or their ministers, to treat of subjects in which they have a common interest, the time and place of such assemblages shall be previously arranged by diplomatic communications; and in the event of such reunions having for their object the condition of other states in Europe, they shall not take place except in pursuance of a

formal invitation to those by whom these states are directed, and under an express reservation of their right to participate directly or by their representatives : METTERNICH, NESSELRODE, CASTLEREAGH, ALEX. DE HUMBOLDT, RICHELIEU¹."

The wording of this declaration bears evidence of extreme caution. The objects of the powers are set forth in very general terms. Their union is not a momentary combination; it exists for the maintenance of the treaties, and the support of the rights established by them; it is directed towards assuring the permanence of a system which can secure European peace; it contemplates action by the machinery of Congresses; and it will admit to such Congresses the representatives of any of the lesser states whose condition may be the subject of the deliberations. These are the only propositions that can be extracted from it; and some of them leave much to be desired on the score of definiteness. No doubt the statesmen who drew it up were well aware of this; and there can be as little doubt that they made their phraseology vague of set purpose. Had they attempted to lay down a clearly defined scheme for the regulation and limitation of their common action, they would inevitably have disagreed before they had got half-way through their task. The great thing was to determine for the future to act in concert when important European questions came up for consideration. If there was an honest desire to discover a settlement, difficulties would probably vanish as the deliberations of the powers proceeded, and some sort of working solution would suggest itself. As time went on circumstances would define with increasing clearness the sphere within which the Concert of Europe could act with

¹ This protocol is taken from a note in Sir A. Alison's *Life of Lord Castlereagh*, Vol. III. p. 66. I have not been able to see the French original.

advantage, the nature of its procedure, the bounds of its authority, and the principles it should apply to the problems that came before it. In short the working out of a scheme for regulating the operations of a great central authority in Europe was left, and wisely left, to the action of the natural forces astir in the political world. All that was consciously agreed upon was that such an authority should be created, and that the five Great Powers should constitute it.

But in such matters as these evolution means conflict. Development can go on only through the sharp clash of opposing principles, and the selection from among them of those which stand best the rough test of practice. It is not therefore to be wondered at that in the early days of the new system great dissensions arose between the powers as to its scope and meaning. For some time it appeared probable that the system itself would be destroyed in the quarrel about the nature of the subject matter to which it could legitimately be applied. The danger arose through the proceedings of the Holy Alliance.

Established at Paris in September 1815 through the influence of Alexander I. of Russia, the Holy Alliance was originally an agreement between the Sovereigns of Russia, Austria and Prussia to apply to political and international affairs the precepts of the Christian religion. It arose naturally from the exaltation of mind produced by the triumphant result of the long struggle against Napoleon. Now that the oppressor was removed, an era of universal peace and brotherhood had dawned, so it was believed, for the downtrodden nations. What then more natural than that princes like the Russian Emperor, into the composition of whose nature dreamy enthusiasm

and chivalrous devotion largely entered, should league themselves with their fellow Sovereigns in a solemn compact to rule justly and mercifully, to regard one another as brothers, and to treat their subjects as children! Under the influence of these emotions the treaty was signed, and offered to Great Britain for acceptance. But the English ministers refused to commit themselves to a document so vague in its terms, though they publicly expressed their admiration of the exalted principles embodied in it.

Before long, however, events occurred which deprived the Holy Alliance of its indefinite character, and caused it to become a league of absolutist Sovereigns for the purpose of putting down by force, if necessary, all movements in favour of political liberty among the continental states. It shewed itself in this character in the year 1820, when the revolutions which had taken place in Spain, Portugal, Naples, and Piedmont, and the general ferment among the continental populations, were the subject of anxious deliberations at the Congress of Troppau, which was followed immediately by the Congress of Laybach held in January 1821. At these Congresses a great divergence of opinion made itself evident. The Sovereigns who were parties to the Holy Alliance desired that the Great Powers should join together in a mutual guarantee against revolution, and should destroy by force of arms all liberal constitutions that had been extorted by the people from their princes. On the other hand Great Britain, supported at first by France, took the ground that the alliance of the five Great Powers was not made for the purpose of upholding one particular form of government, and that there existed no general right of interference in the internal concerns of other

states. The views held by this country with regard to the nature of the concert established at Aix-la-Chapelle among the Great Powers of Europe were set forth in Lord Castlereagh's circular despatch of January 19, 1821. He referred to the claims made by the Sovereigns assembled at Laybach to safeguard the continent against revolution by suppressing all disturbances having for their object reform in the political constitution of neighbouring states, and declared that the British Ministers "do not regard the alliance as entitled under existing treaties to assume in their character as allies any such general powers, nor do they conceive that any such extraordinary powers could be assumed in virtue of any fresh diplomatic transaction amongst the allied courts, without their either attributing to themselves a supremacy incompatible with the rights of other states, or if to be acquired through the special accession of such states, without introducing a federative system in Europe, not only unwieldy and ineffectual in its object, but leading to many most serious inconveniences." Similar views were expressed by the same statesman in a confidential minute on the affairs of Spain, which was communicated to the courts of Austria, France, Prussia, and Russia. In it he says, "In this alliance, as in all other human arrangements, nothing is more calculated to impair, or even to destroy its real utility, than any attempt to press its duties and its obligations beyond the sphere which its original conception and understood principles will warrant. It was an union for the reconquest and liberation of a great proportion of the continent of Europe from the military dominion of France; and having subdued the conqueror it took the state of possession as established by the peace under the protection of the alli-

ance. It never was, however, intended as an union for the government of the world, or for the superintendence of the internal affairs of other states."

On the other hand the statesmen of the absolutist league were not mute. At Troppau on December 8, 1820, the ministers of Russia and Prussia put forth a joint circular, in which they represented that the system of the Holy Alliance was not in any sense new. It was but the faithful application of principles embodied in the alliance of the five powers. It did not contemplate general interference in the internal concerns of other states, nor was it hostile to wise reforms voluntarily granted by Sovereigns to their people. Revolution and violence were what it was aimed at; and the parties to it confidently expected the aid of England and France in "the measures of conciliation" they proposed to undertake in Naples and other states. This expectation was, as we have seen, doomed to disappointment. The two Western powers declined to take part in the contemplated intervention. Austria, with the concurrence of Russia and Prussia, sent her forces into Italy, and restored the Kings of Naples and Sardinia to the plenitude of their absolute power. After the overthrow of the liberal movement in the peninsula the Holy Alliance adopted a more decided tone. In the circular issued from Laybach on May 12, 1821, the assembled Sovereigns proclaimed their intention to regard "as null and disallowed by the public law of Europe, any pretended reform effected by revolt and open force;" and soon after they fulminated against the Greek Revolution, and took seriously in hand the affairs of Spain.

France, which at first had been disposed to side with England in maintaining the principles of non-intervention

in the purely internal affairs of neighbouring states, was now, after a period of hesitation, definitely ranged on the side of the Holy Alliance. She deemed herself to have just cause of quarrel with the constitutional Government of Spain; and at the Congress of Verona, held in the Autumn of 1822, her grievances were laid before the assembled powers, who, with the single exception of Great Britain, were glad to obtain a pretext for putting down the revolutionary movement in Iberian territory. The Duke of Wellington, who represented the English Government at the Congress, declined to take part in the measures adopted by the other plenipotentiaries on the ground that "His Majesty's Government are of opinion that to animadvert upon the internal transactions of an independent state, unless such transactions affect the essential interests of His Majesty's subjects, is inconsistent with those principles on which His Highness has invariably acted on all questions relating to the internal concerns of other countries." Canning, the successor of Lord Castlereagh at the Foreign Office, carried on his late colleague's policy with conspicuous vigour and ability. He protested against the invasion of Spain by France, and checked the career of the Holy Alliance by raising up an adversary to it on the other side of the Atlantic. As soon as the Constitution of the Cortes was overthrown in Spain, and Ferdinand VII. restored to absolute power, the confederated Sovereigns formed the design of reconquering for that monarch the Spanish Colonies in America, which had separated themselves from the mother-country and adopted the republican form of government. After long negotiations between the Cabinets of London and Washington, President Monroe was induced to insert in his Message of December 2, 1823, the famous

declaration that he should consider any attempt on the part of the allied powers to extend their system to the American continent as dangerous to the peace and safety of the United States, and that his Government could not behold such interposition with indifference. The effect of these outspoken words was marvellous. They were received with joy in England, with execration in the Chancellories of the allies, who did not venture to invade Spanish America in the teeth of the hostility of the United States. Canning's boast that he had "called a New World into existence to redress the balance of the Old," was amply justified. He completed the discomfiture of the common enemy by recognizing the independence of the most powerful of the revolted colonies. The Holy Alliance never recovered from these blows. It dragged on a maimed and dwarfed existence for some years longer, but it never again became paramount in Europe.

The effect of these transactions was twofold. We have just seen that they destroyed the power of the Holy Alliance; and it is evident that in doing so they discredited the principle that the European Concert existed for the purpose of protecting despotic monarchs from revolutionary movements among their subjects. But while they produced this most beneficial result, they also seriously weakened the principle of common agreement among the powers. The action of England in separating herself from the other great states produced a vast amount of irritation; and though by the stand she made she earned the gratitude of all lovers of freedom, it cannot be denied that the European Concert was a long time before it recovered that cordiality which is essential to its fullest utility. Yet the gain greatly outweighed the loss. If the Great Powers had become thoroughly united in an all-

powerful league for the purpose of interfering by force of arms in the internal concerns of any of the smaller states whose people might prefer a form of government too liberal for the taste of the continental despots, all free national life and all healthy national development would have come to an end in Europe. It was better to run the risk of sacrificing the directing influence of a central authority, than to allow its operations to be extended into the sphere of the internal activity of states. As a controlling and mediating influence in external affairs it had a most valuable function to perform; and the cause of peace and civilization would have suffered seriously if it had been destroyed. The final result of the action of England was to check its tendency to evil, and concentrate its strength on those international difficulties which demand for their satisfactory solution the united efforts of many powers.

We have now seen how the Concert of Europe was established, and what were the dangers which threatened it in the early years of its existence. A rapid glance at some of the most important transactions of recent times will be sufficient to shew that the Great Powers have by the tacit consent of all the states of Europe a kind of superintending authority in many matters. At the same time it will convince us that the English view of the nature and limits of that authority has been in the main accepted. Internal changes in the constitution of states have not been regarded as matters of European interest. The Great Powers have refrained from interfering with them. They have neither suppressed revolutions, nor enforced reforms. The case of the Turkish Empire is an exception; for at the Conference of Constantinople, held in the winter of 1876-7, a scheme of internal reform was drawn up and

pressed upon the Sultan. He, however, refused to adopt it, and the Great Powers took no collective action in order to compel the acceptance of their advice.

The establishment of the kingdom of Greece was preceded by long and complicated negotiations between the Great Powers. The Holy Alliance took the revolt of the Greeks against Turkey into its unfavourable consideration soon after the first outbreak of insurrection in 1821; but it adopted no active measures to put down the movement; and indeed for some time there was a prospect of intervention by the Russian Emperor in favour of his oppressed co-religionists. England and France from the beginning took part in the negotiations, and let it be well understood that they did not intend to allow the affairs of the Turkish Empire to be settled by Russia alone, or by the Northern Alliance. When diplomacy bore fruit in action, England under Canning sympathized with the Greeks, and was foremost in the endeavour to assist them. She negotiated with Russia the secret convention of 1826, and with France and Russia the open treaty of 1827. These two instruments provided for the intervention of the allies in favour of the Greeks, and the creation of a Greek Kingdom. In the long and intricate transactions which followed we find the same three powers always taking the lead, and when Greece was finally erected into a Kingdom, they guaranteed its sovereignty and independence by the Treaty of London, signed on May 7, 1832. But these steps were not taken till the consent of Austria and Prussia had been secured. It was always held that they had a right to a voice in the negotiations, though they gave no active assistance in the work of rescuing the Greeks from Turkish tyranny. Similarly in 1862, when King Otho was compelled to abdicate, and a successor was

required to fill the vacant throne, all the Great Powers were consulted; but Great Britain, France and Russia took the most prominent part in the transactions which resulted in the election of Prince George of Denmark as King of the Hellenes. At length the affairs of Greece came in form as well as in reality under the notice of the European Concert, when in 1878 and 1881 her claims to an increase of territory at the expense of Turkey were adjudicated upon by the representatives of the Great Powers assembled in conference at Berlin.

The foundation of the kingdom of Belgium was also, due to the exertions of the Great Powers, and in this case they were all formally concerned in the matter from the beginning. They were called in originally by the king of the Netherlands to mediate between him and his revolted Belgian subjects; but they soon assumed the position of dictators, and in spite of his remonstrances decreed the erection of Belgium into a separate Kingdom, and its complete neutralization under their guarantee. After many disagreements among themselves, they carried this scheme into effect by the treaties of 1839, but not without much bloodshed, due to the struggles of the parties immediately concerned, and the forcible intervention of England and France to make the king of Holland evacuate the Belgian territory.

The Crimean war was fought with the object, among others, of taking the destinies of the subject Christian populations of Turkey in Europe out of the hands of Russia alone, and confiding them to European control. Among the powers who negotiated and signed the Treaty of Paris of 1856, which closed the war, were Austria and Prussia. They had not been belligerents; but they were allowed to become parties to the treaty in their quality

of Great Powers. In the same way England, France, Germany and Austria took part in the settlement of Eastern affairs made in 1878 by the Treaty of Berlin, though none of them had been engaged in the previous war between Russia and Turkey.

The position of Egypt as a part-sovereign state under the suzerainty of the Porte is due to the intervention of the Great Powers. Had they held aloof it is extremely probable that Mehemet Ali would in 1839 have made himself master of Constantinople, and have founded a new line of Ottoman Sovereigns. It is true that France was unable to agree with the other powers as to the settlement imposed upon the belligerents by the Treaty of London of 1840, but she was not deemed to have lost in consequence the right to take part in the further counsels of Europe on Egyptian affairs, and in practice her voice has not been by any means the least potent with regard to them. The cutting of the Suez Canal has had the effect of adding several new problems of great importance to those which originally drew the attention of the Great Powers to Egypt. Whatever may be the result of the British occupation of the country brought about by the expedition of 1882, we may be quite sure that as it was preceded, and in a measure sanctioned, by a Conference of the Powers, so it will ultimately be succeeded by arrangements which have received their consent. The final settlement must, in the words of Mr Gladstone, "be arrived at with the intervention and under the authority of Europe, and never could be adequately founded upon the simple conclusion of any single power of Europe¹."

The foregoing examples by no means exhaust the

¹ Speech in the House of Commons, Aug. 10, 1882.

subject; but they are sufficient to shew that the Great Powers have by modern usage a position of preeminence in European affairs, which is so marked, and has such important legal results, that the old doctrine of the absolute equality before International Law of all sovereign states is no longer applicable. It is not merely that the stronger states have influence proportionate to their strength; but that custom has given them what can hardly be distinguished from a legal right to settle certain questions as they please, the smaller states being obliged to acquiesce in their decisions. At present this right is in a rudimentary stage; but it tends steadily to increase in importance. Great living statesmen build their best hopes for the just and peaceful settlement of international disputes upon the preservation of the European Concert; and the European Concert means nothing more or less than the agreement of the six Great Powers. Sometimes, when other smaller states are directly interested in the question at issue, their representatives are admitted to take part in the negotiations, according to the provisions of the protocol agreed to at Aix-la-Chapelle in 1818. For example, in 1867 Holland and Belgium were invited to join in the Conference of London, because the matter in dispute concerned the Grand Duchy of Luxemburg, which was intimately connected with both those states. And, again, in 1884—5 the West African Conference, which laid down most important principles with regard to trade, navigation, and political control in the Basins of the Congo, and the Niger, and agreed upon valuable rules as to future acquisitions of African territory by means of Occupation, was attended not only by the plenipotentiaries of the Great Powers, but by representatives of Belgium, Den-

mark, Spain, Holland, Portugal and Sweden, as trading and colonizing nations. Turkey also was allowed a plenipotentiary on the ground that she had possessions in Africa; and the cooperation of the United States was asked and granted, for the obvious reason that she is an important maritime power, and that her merchants and seamen are largely interested in the districts with which the Conference had to deal. On the other hand instances are not wanting of a refusal to allow a minor state to take part in deliberations which vitally concerned itself. Thus in 1878 Greece was not allowed to be present by her plenipotentiaries at the Congress of Berlin, when her claims for an increase of territory were adjudicated upon. The Greek representatives were called in to be heard, and after they had made a statement on behalf of their country, they were directed to withdraw, and the question was discussed in their absence. These cases shew that the Great Powers have not adopted any definite method of action. Their superiority is a comparatively new thing; and no custom has yet grown up as to the exact manner in which it shall be used. .

The Concert of Europe exists as a kind of International Court of Appeal; and incidentally it sometimes assumes legislative functions, as when by the neutralization of Switzerland, Belgium and Luxemburg, it virtually imposed new rights, and obligations on states who may be brought into contact with them, or when in 1878 at Berlin it decreed that on certain conditions Servia and Roumania should be raised to the rank of wholly independent powers. But though, like an English Court, in deciding difficult cases it may occasionally be said to legislate, its procedure is not settled, nor is the nature and extent of its jurisdiction determined. Over

some questions it exercises undisputed control. Others it does not attempt to influence in the slightest degree. Thus since 1856 all the arrangements necessitated by the gradual break-up of the Turkish Empire, and the political aspirations of its subject Christian races, have been decided by the Great Powers. But they did not claim the right to revise the conditions of peace between Prussia and Austria in 1866, or between Germany and France in 1871. Still less would they be likely to interfere in any question between the United States and a European power. The rulers of the great American Republic have always been extremely anxious to keep their country out of European complications, and they have shewn equal solicitude to prevent the introduction of the state system of the old world into the affairs of the American Continent. We may, therefore, say that the supremacy of the Great Powers is felt only in matters which are connected more or less intimately with European politics, though they may not belong geographically to Europe. But we cannot go beyond this, and distinguish clearly between the kind of questions which must be settled by the Concert of Europe, and the kind of questions which the powers more immediately interested would be allowed to settle for themselves. Moreover, it must be clearly understood that the Great Powers do not possess more extensive rights than other states in matters connected with property and jurisdiction, or in the conduct of war and neutrality. Germany is as much bound as Holland to treat her prisoners with humanity. France claims no greater authority over Frenchmen in Portuguese territory than Portugal has over her subjects in France. The territorial waters of Great Britain extend to no further distance from her

shores than those of Greece. The flag of Austria, Russia, or Italy confers no greater immunities on the ships that sail under it than does the flag of Spain or Sweden. In these respects the states whose unanimous voice finds expression in the Concert of Europe are very much like the members of a modern Cabinet, who exercise collectively a vast influence over the lives and fortunes of others by their power of directing the policy of the state, but possess individually no greater personal rights than the humblest of their fellow-citizens.

It seems clear, then, that the six Great Powers have by modern International Law an authority superior to that of other states; but that the method of exercising it, and the subject-matter with respect to which it should be exercised, are by no means fully defined. They depend rather upon the will of the powers themselves, and the circumstances of each particular case, than upon any general rules. The same thing may be said of the means of enforcing obedience to their decisions. There is no definite sanction capable of being known beforehand, and sure to fall upon any state which sets at naught the award of Europe. But when the Great Powers have come to an agreement on any question, they generally find means to make their decision respected. Sometimes one or two of them wage actual hostilities against the recalcitrant state, as the formal or informal mandates of the others. Sometimes a naval demonstration, or a mere threat of war, is sufficient. Sometimes the Powers consent to a compromise, and forego a portion of their demands on condition of compliance with the remainder. We have not yet arrived at a formal European Areopagus. All we have at present is a very real superiority before the law on the part of the Great Powers. Whether that

superiority will develop into a properly organized Court of Appeal, with sufficient wisdom and justice to decide international controversies aright, and sufficient power to enforce its decisions, time alone can decide. It is certain that such a court will never be created all in a moment in accordance with the provisions of some cut and dried scheme. If it ever exists at all, it will come into being slowly. The circumstances of each age will help to shape and form it according to current needs. It will be gradually developed from the germ at present existing.

There cannot, I think, be a doubt that the league of the six Great Powers differs in kind from any other alliance among the States of Europe. It by no means excludes the possibility of smaller and more intimate conjunctions. They have existed side by side with it from the commencement of its history to the present time. But they have never been held to possess the international authority which is ascribed to the Concert of Europe. Germany and Austria, for instance, are at present united by the bonds of an exceedingly close alliance, and their power as a great peace league is most beneficial. But if they were to agree upon the neutralization of any state, the treaty they might make for that purpose would not be held to bind the whole of Europe; whereas when the Great Powers guaranteed the neutrality of Belgium, they fixed the international *status* of the newly-created kingdom, and made its neutralization a principle of public law. The consent of the lesser states was not asked; but they were tacitly assumed to be bound by the act of their more powerful neighbours. Similarly in such matters as recognition of independence,

admission of another state to the rank of a Great Power, and reception of a semi-civilized state into the family of nations, the Great Powers act on behalf of others as well as themselves. They speak in the name of Europe, and bind it by their decisions.

It seems to me that, in the face of such facts as these, it is impossible to hold any longer the old doctrine of the absolute equality of all independent states before the law. It is dead; and we ought to put in its place the new doctrine that the Great Powers have by modern International Law a primacy among their fellows, which bids fair to develop into a central authority for the settlement of all disputes between the nations of Europe. Nothing is easier than to sneer at this principle. The Concert of Europe may be held up to ridicule from one point of view as a party of wicked old men sitting round a green baize table, and from another as a brass band woefully out of tune, with each musician intent only upon playing his own particular melody. No doubt it is at present in a very rudimentary condition, and there are often jealousies and intrigues among the states which compose it. It is slow in deliberation, and uncertain in action. Its decisions often fall short of the demands of justice. They are patched up as compromises between opposing views, rather than delivered as the judgments of an impartial tribunal. Still with all its faults it has done great good by settling on the basis of mutual concession disputes which might otherwise have led to war. And above all it is a natural and healthy growth. It has sprung without any forcing out of the circumstances of modern Europe; and therefore it possesses a chance of permanence. It is probably destined to

become more and more effective as the desire for a peaceful settlement of their quarrels increases among the nations; and it may in some far distant time develop into that Supreme Court of International Appeal, for which statesmen, philosophers, and divines have longed throughout the last three centuries.

ESSAY VI.

THE EVOLUTION OF PEACE.

THE time has passed when war was regarded as the one occupation fit for princes, and the sole source of the glory of states. Civilised rulers at least profess to use all possible solicitude in order to avoid an appeal to arms; and there can be no doubt that in a large majority of cases their practice corresponds with their avowals. The vast accumulation of wealth, due to the wonderful manufacturing and commercial development of the past century and a half, has made the stakes too great for the war game to be lightly entered upon. Moreover the complexity of modern life causes the interests of all nations to be so bound up in the question of peace or war between any two of their number, that an enormous weight of outside pressure is always brought to bear upon the parties to a quarrel in favour of its pacific settlement. Commerce is thus a great peacemaker, though its influence in this direction may be easily exaggerated, if we leave out of account its tendency to cause little wars by forcing at the sword's point upon barbarous tribes the blessings of cheap calico and adulterated rum. Yet, after making all needful

allowances, there cannot, I think, be a doubt that trade influences on the whole make for peace under the conditions of the modern commercial system.

It was not so a century ago, when the great conflict between the maritime powers for colonial empire was yet unfinished, and each state strove to monopolize for itself the trade with its own possessions beyond the seas. In those days a successful war enlarged the area of a nation's trade, by opening out to it new markets and increasing the number of its dependencies. The inscription at the foot of the statue of the great Earl of Chatham in the Guildhall, to the effect that under his rule commerce had been "united with and made to flourish by war" was no idle boast. It expressed a truth which stares the reader in the face on every page of the record of his great administration. But at the present day all the conditions are changed. The old restrictive colonial policy is dead, and buried under the ruins of the mercantile system. Adam Smith has changed the world's ideas on the subject of international trade. The struggle for colonial empire ended for a time with the victory of England in the last great duel with Napoleonic France; and its renewal during the past few years has taken the form rather of aggressions upon Oriental peoples, and races to be first in the appropriation of unoccupied territories, than of wars between European powers waged in every quarter of the globe. Moreover the resolutions of the late West African Conference will tend materially to prevent hostile encounters arising out of endeavours on the part of maritime states to reduce into possession what is now the only large portion of the world not under civilised rule. For not only has it defined the conditions of an

effective occupation of African territory ; but it has also decided in favour of freedom of navigation for the Congo and the Niger and their tributaries, and freedom of trade throughout the vast regions contained in the Conventional Basin of the Congo. It has even made an effort to secure the exemption of these territories from hostile operations in future wars¹. All these things are marks of a great change in the circumstances of modern commerce ; and go far to prove the truth of the famous dictum of the present Earl Derby, that "the greatest of British interests is peace." Convulsions in the remotest corner of the world injure the fabric of our prosperity. A revolution cannot take place in Honduras, or an outbreak of piracy on the Orinoco, without doing some damage to British trade. British merchants must feel the effects of a blockade of the ports of China, or a civil war in independent Burmah. There are few corners of the world, however distant, few states, however insignificant, in the affairs of which our commerce does not give us an interest on the side of international amity. Not only are we ourselves bound over in large sums to keep the peace by reason of our world-wide commerce, but we are impelled by self-interest to induce other nations to keep it also. And in the same way they, or at least the more powerful and wealthy among them, are induced by similar motives to take up a similar peaceful position towards each other, and towards us.

The growth of democratic ideas has created another force, which on the whole makes for peace.) The notion that the people existed for the king, and the king existed to win territory and renown at the expense of neighbouring kings, has died away under the influence

¹ *Africa*, No. 4 (1885).

of modern notions of liberty and human brotherhood. The nations cannot now be used as pieces in a game of skill between their respective rulers. They claim a voice in the shaping of their own destinies. It is much harder to-day than it was even a hundred years ago for a ruler to

“Cry havoc, and let slip the dogs of war,”

for his own selfish dynastic purpose. Yet we must not flatter ourselves that Demos is altogether pacific. Warlike passions exist and rage among peoples, as well as among princes. But it is necessary now to show at least a semblance of a national cause, an appearance of a national interest, before a state can be involved in hostilities by its rulers with safety to themselves. Mere statecraft has much less to do with wars under modern conditions, than it had before the era of a free press and representative institutions.

We see then, that two of the most important forces in the modern world operate on the whole in favour of peace. Commerce flourishes most where there is the most perfect security; and the participation of the people in the business of government puts the power of vetoing war into the hands of those who suffer most by it. Thus (an incidental effect of the extension of commerce and the growth of democracy has been to strengthen the pacific sentiments of civilized men.) But in addition to these forces the main object of which is not peace, but in the first case the production of wealth, and in the second the increase of political liberty, there is also a potent cause which operates directly and immediately to restrain the warlike passions of human nature. I refer to the application of Christian morality to international transactions. This portion of human conduct was one

of the last to feel the influence of the Christian religion. Slowly and painfully Christianity attacked one side after another of human life, and brought each in succession under its rules. Slavery was gradually destroyed, family life purified, veracity insisted upon first in private matters, and then in business transactions, the doctrine of the sanctity of human order and government applied to win respect and obedience for rulers, and the doctrine of the brotherhood of man applied to securing good treatment and political rights for the governed. But the sphere of international relations for a long time seemed to withstand Christian influences. When they entered it at all they did so merely in consequence of the commands of an external authority—that of the Roman pontiff; and after the decay of his power a period of utter lawlessness had to be passed through, as I shewed in a previous Essay. But the new system of International Law which arose on the ruins of the old supremacy of the Pope and the Emperor contained within itself Christian elements. The greatest of its founders was profoundly horrified at the barbarous license of war between Christian nations, and profoundly convinced that Christian people were bound to use towards one another a stricter faith and a gentler humanity than was commanded by that Law of Nature on which he based his system. No one can read the great third book of the *De Jure Belli ac Pacis*, and follow what is said therein on the subject of *Temperamenta Belli* without noticing that Grotius is everywhere striving on avowedly Christian grounds to introduce into the international code the most merciful rules he can find. And as these rules were precisely the portion of his book which had most effect on practice, we may assert with confidence that the modern law of nations bore from the

beginning the impress of Christian influences. At first those influences were chiefly if not entirely felt, so far as the state of war was concerned, in the improvement of the rules which deal with the conduct of actual hostilities. But of late years a further step has been taken, and an attempt made with no small share of success to apply Christian morality to the regulation of those passions and interests which impel nations into war. It is, of course, no new discovery that Christianity is a religion of peace, any more than it was a new discovery at the beginning of the seventeenth century that Christianity was a religion of mercy. The innovation now, as then, consists in getting people to give a real heartfelt assent to propositions which they have been repeating all their lives, and to regulate their conduct by precepts which they have formerly been content to treat with distant respect.

Now, without entering upon disputed questions as to the exact meaning of certain passages in the Gospels about non-resistance, we may assert with the utmost confidence that Christianity regards war as an evil, and an evil so great that Christian states should make the most strenuous efforts to avoid it. The world will not be governed on Christian principles till some more rational and less cruel method of settling disputes has been substituted for an appeal to force. In proportion, therefore, as Christianity succeeds in influencing the conduct of states in their mutual relations, war will become more and more rare; and if ever mankind reaches perfection, it will be unknown. There cannot be a doubt that what we may call Christian views of war have become far more influential of late years. It is not merely that the profession of arms is no longer considered the

only one fit for a gentleman, or that no writer would now venture to say with Machiavelli, "A prince is to have no other design, nor thought, nor study, but war, and the arts and discipline of it; for indeed that is the only profession worthy of a Prince¹." But modern statesmen have eagerly clutched at any honourable means for settling quarrels which less than a century ago would have certainly led to war; legislatures have passed resolutions in favour of arbitration in disputes between nations; and diplomatists have inserted arbitral clauses in many treaties. During the present century arbitration has been successfully tried in a large number of international disputes, and decade by decade the number of instances of its application has steadily increased. Great Britain, for instance, submitted one dispute with a foreign power to arbitration between 1820 and 1830, one in each of the following decades up to 1870, and seven between 1870 and 1880. These facts shew conclusively that Christian morality is at length beginning to make itself felt in the combative portion of international activity, a region of the domain of human conduct which for a long time resisted its influence.

We have, therefore, three of the greatest forces in modern life—Commerce, Democracy, and Christianity—ranged together on the side of peace; and, seeing their immense power, we might be tempted for a moment to suppose that the civilized states of the earth were rapidly approaching the time "when nation shall no longer lift sword against nation, neither shall they learn war any more." But unfortunately there is another side to the medal; and we have only to look upon it to destroy all

¹ *The Prince*, Chap. xiv.

the sanguine expectations we may have previously formed. At the present moment the leading states of Europe maintain armaments far larger than were dreamed of a century ago; and governments devote a most disproportionate amount of their skill, energy, and revenue to perfecting their military organization. The continent bristles from end to end with bayonets. Nearly four millions of men are annually withdrawn from peaceful avocations to learn the business of mutual slaughter. The mere preparation for war involves this terrible tax on the manhood of the nations. War itself demands far more numerous victims. Its outbreak at once doubles or trebles the armies; and were they all on a war footing at the same time, something like twelve million men would be under arms together. And, be it remembered, these calculations take no account of the various navies. If sailors were counted as well as soldiers, some hundreds of thousands would have to be added to the appalling totals already given. All these millions of men are armed with the most powerful weapons science can devise. Year by year new inventions are pressed into the service of warfare, and a large portion of the cultivated intellect of mankind is employed in improving the organization of armies, and rendering more deadly the instruments and appliances they use. In other departments of life expense is the barrier which limits improvement. For the business of destruction alone wealth is poured out like water, and the nations tax themselves up to their utmost capacity, undertaking burdens which seriously sap the springs of industry, and hinder the development of commerce. It has been calculated that in one year Europe spends upon her armies and navies, including the loss caused by the withdrawal of men from productive labour, as well as the

expense of their maintenance and equipment, something like £550,000,000¹.

Art and literature, too, combine with science to help on the work of slaughter. Poets and painters celebrate the "pomp and circumstance of glorious war", till people come seriously to regard it as a thing of bands and banners, of glittering uniforms and burnished steel, of deeds of heroic daring and examples of lofty self-sacrifice. They forget the stern realities of cold and hunger, wounds and death, the shattered limbs, the fever thirst, the fiendish passions of cruelty and lust. They forget the demoralization it causes among both victors and vanquished, and the widespread ruin and distress that follow in its train. For

"Who can think on sadness and on death,
The darkness and the silence of the grave,
The nameless anguish of life's ebbing breath,
When the loud trumpet flattereth the brave,
When youth is strong and fancy young,
And glory lifts the heart like wine?
O God, the knell of nations may be rung
In notes that are divine!"²

No one dares to describe war as it really is. Add to the vice and misery of outcast London the horrors of a great explosion, a great fire, and a great railway accident, and you will have some faint idea of the manifold evils of a long campaign. In the twenty-five years from 1855 to 1880 over 2,000,000 men were killed in wars between fairly civilized powers; and who can calculate the awful

¹ I have taken many of the calculations in this part of the Essay from papers published by the Peace Society and the International Arbitration and Peace Association. The rest I have made for myself from figures given in the *Statesman's Year-Book* and other sources of information.

² F. Tennyson, *Days and Hours*.

mass of human misery represented by those few figures? Only a very small portion of that total died what we in our ignorance call a 'soldier's death' by shell, or bullet, or the cold steel. Even such a death is far more terrible than is commonly supposed. This is how it was described in 1870 by one who had seen it on a large scale in many lands. Dr Russell of the *Times* wrote the following account of the battle-field of Sedan. "Let your readers fancy masses of coloured rags glued together with blood and brains, and pinned into strange shapes by fragments of bones. Let them conceive men's bodies without heads, legs without bodies, heaps of human entrails attached to red and blue cloth, and disembowelled corpses in uniform, bodies lying about in all attitudes with skulls shattered, faces blown off, hips smashed, bones, flesh, and gay clothing all pounded together as if brayed in a mortar, extending for miles, not very thick in any one place, but recurring perpetually for weary hours, and then they cannot with the most vivid imagination, come up to the sickening reality of that butchery." Yet this, I repeat, is the best, not the worst side of the sufferings caused by war. Comparatively few of those who perish die upon the battle-field. Thousands succumb from sheer exhaustion, having endured for weeks, perhaps months, the slow agony of failing strength, under the influence of privation and over-exertion. Thousands more die of disease, numbers of them from want of the commonest comforts of the sick. Starvation demands one host of victims, fever another, neglected wounds a third. Vice of all kinds simply preys upon the soldiery, and exacts its terrible toll of moral and physical ruin. Even well-appointed and victorious armies melt away under the influence of

sickness and fatigue, unless continually reinforced from their base. What then must be the case with a broken and retreating army, an army separated from its supplies, or an army cooped up within a beleaguered fortress? Let the 300,000 French soldiers whose bones strewed the plains of Russia from Moscow to the Niemen provide the answer. Read in the history of a still more recent period how a British army was destroyed by cold and privation in the trenches before Sebastopol, while the transport ships rocked idly in the harbour of Balaclava, almost within sight of the half-starved men who were dying like flies for want of the comforts they contained. Consult the files of English newspapers for 1877 as to the condition of the hospitals at Plevna, when the Russians entered the town in the fall of that year, and found the wounded with broken and unset limbs twisted out of all human recognition—the whole place a veritable charnel-house. In records such as these you will read the true history of warfare. No one who is acquainted with it, and still preserves the ordinary feelings of humanity, will venture to dispute the proposition that, in spite of all the progress we have been engaged in reviewing, much remains to be done before popular ideas and sentiments on the subject are brought into a healthy condition. There must be a great change in the ordinary modes of thinking and speaking of war, before current opinion with regard to it conforms to the standard of Christianity.

We must not expect rulers to be far ahead of those they govern in this matter, though there has been more than one instance in recent times where the forbearance of statesmen prevented a war which would have been applauded by the popular voice. Nor can we attach

much importance to elaborate plans for abolishing war through the instantaneous creation by the general consent of states of a great international court for settling their disputes. In proportion as the civilized nations of the world come to want such a tribunal, they will create it by the means and with the materials they find ready to their hands, not fashioning it entirely at one time and with one effort, like a piece of manufactured goods, but developing it gradually little by little as circumstances and opportunities allow. Till the need of it is universally felt no complicated machinery devised by philosophers in their studies has the least chance of acceptance, or of working successfully, if it were accepted.

Such considerations as these are fatal to the schemes of Leibnitz, St Pierre, Kant, Bentham, James Mill and others, quite apart from the many serious objections which might be raised to them from a practical point of view. They bear indeed much the same relation to the hard facts of international action as do the rules of maritime capture advocated by some continental publicists to the exigencies of naval operations. As Ortolan said of the latter that they were not written by sailors; so we may say of the former that they were not written by statesmen. Take, for instance, the schemes of Kant and James Mill. Their authors were men of marvellous ability, though in other respects as unlike one another as two great thinkers could be. Kant effected a revolution in philosophy; and Mill was one of the foremost leaders in the Benthamite crusade against all that was ignoble and foolish, and much that was wise and good, in our laws and institutions. Yet each was guilty of the error of weaving a web of theory out of his own brain, instead of endeavouring to discern and utilize the tendencies

which were actually making for peace in the world around him. Kant did no doubt recognize the truth that many ages would elapse before states were fitted to receive and act upon any such plan as that which he proposed. He held that the world as it progressed would gradually work up to it, and at last adopt it; but he deliberately went out of his way to add to the difficulties naturally inherent in the task of winning acceptance for it. The leading feature of his scheme was the establishment of a great confederation of independent states. But this proposal was accompanied and overweighted by others, which assuredly are not essential to its realization, and which could only have been joined with it in order to gratify a philosophic craving after absolute perfection. The plan of the sage of Königsberg provided that every state should have a republican constitution, and that no state should absorb another by heritage, exchange, purchase, or gift, as well as that no loan should be raised to carry on war, and that standing armies should be abolished¹. If the two latter provisions may be deemed essential to the successful working of the main article of the scheme, surely as much cannot be said of the former two. In every-day life we do not, if we want to accomplish a difficult task, deliberately add to it others still more difficult of performance. We seek instead to remove all adventitious obstacles, so that we can concentrate our efforts on the main undertaking. And the same principle holds good in the affairs of the great society of states. It is wise in every case to advance along the line of least resistance. Possibly the distant future may see such a federation as

¹ Kant, *Metaphysische Anfangsgründe der Rechtslehre*.

Kant contemplated ; but assuredly its chance of coming into existence is rendered much more slender, if every non-republican state must first change its constitution.

The plan of Bentham, which James Mill adopted with various omissions and additions, involved a general disarmament, and the universal abandonment of their colonies by the leading states of Europe. These proposals are certainly direct and thorough, but are they not also crude and incapable of realization? Undoubtedly they are quite out of harmony with existing facts and ideas. It is to be hoped that the overgrown armaments of modern Europe will before long be reduced to more reasonable dimensions ; but there is no likelihood of a general agreement among states to disband their troops and turn their navies into merchant fleets. The abandonment of colonies is even less likely to take place. Some of the best as well as some of the worst feelings of humanity cry out against it. Acquisitiveness and ambition forbid the surrender of vast territories which go to swell the possessions and increase the grandeur of the state which owns them: but patriotism, the sense of duty and responsibility, and the mutual affection which ought to exist between the motherland and her daughters beyond the seas, speak in the same tones and issue the same command. Mill did not follow his master in this last proposal. His plan contains provisions for the establishment of an international tribunal ; but so great are his objections to force that he expressly forbids the court to use it in order to compel refractory nations to obey its decrees. He trusts to the influence of public opinion in their favour, and proposes to create such an opinion by providing that "The book of the law of nations, and

selections from the book of the trials before the international tribunal, should form a subject of study in every school, and a knowledge of them a necessary part of every man's education¹." The philosopher who could write thus in all seriousness must have had a most exalted notion of the capacity of the infant mind, as well as a low idea of the length to which adult ingenuity could contrive to spin out arbitral proceedings. Imagine the six thousand or so pages of Blue Books, which contain the record of the Geneva Arbitration on the Alabama Claims, produced in a public elementary school as useful and interesting reading for the unhappy pupils!

In truth these cut and dried schemes are of no value at all, unless as monuments of the mingled simplicity and ingenuity of their authors. Here as elsewhere the process of reform and improvement must be slow and gradual. We cannot expect to attain at one bound the ideal state of perpetual peace, or imagine that we can plan out all the details of institutions which it will be the work of centuries to develop. We must be content to give our aid in strengthening all the healthy sentiments and popularizing all the practical proposals that tend to make wars less frequent in our own time, leaving to the future the task of bringing the good work still nearer to completion by the means best suited to its own circumstances. The great doctrine of development applies here, as in so many other portions of human activity; and while it narrows the sphere within which we can hope our own action will be effective, it at the same time teaches us to see in the little that can be

¹ Article on *The Law of Nations* in the *Encyclopædia Britannica*.

done in one generation a step in a great march of progress, beginning far back in the grey dawn of history, and having its goal in the distant future. The human race will in time outgrow war; and I think we may even now discern the general outline of the process. Perpetual peace will come as the result of a gradual evolution; and some idea of the nature and direction of the causes at work to produce it, may be gathered from an historical consideration of the slow disappearance of private war, which was once far more common than public war is now, or has been among civilized states for many ages.

Private war had its origin in those family feuds which are universal in early stages of civilization. Before law as we understand it now had come into being, before the conception of crime had formed itself in the brain and conscience of the community, before any central authority existed to enforce obedience to the rules it imposed, the rough justice of revenge impelled the injured party and his kinsfolk to retaliate as best they were able upon those who had done them wrong. Every man carried his life in his hand; and as he was his own guardian, so he was his own avenger. Kinship was the sole bond of early society, and therefore the relations on both sides assisted their kinsfolk in the strife; but public authority there was none, and accordingly no attempt was made from outside to compose the quarrel or punish the wrong-doer. In time organization was found to be an advantage in the struggle for existence. The tribes under the control of a chief who contrived to make his will obeyed even in a very imperfect manner, would be able to overcome those who were entirely destitute of discipline. Thus an

authority originally submitted to for warlike purposes only, would be continued in time of peace, and gradually extended to matters of every-day life. The Heretoga or army-leader of our Saxon forefathers is raised by election to the kingly office, as soon as the warriors under his command have carved out for themselves a broad realm from the lands of the vanquished Britons. Once raised to the throne his power rapidly increases. He acts as judge, he establishes courts, he makes laws. But there is an intermediate stage between the organization of the justice of the king and the unrestrained vendetta of primitive times. When families had expanded or united into tribes, the individual was no longer his own guardian. The protection of the community was thrown around him. He was in the peace of the folk, and so also was his foe. When he was wronged he appealed to the assembly of tribesmen, not to judge the cause and mete out just punishment to the offender, but to give him leave to inflict his vengeance with his own hands. In the words of the brilliant writer by whose untimely death English History has been deprived of one of its most able interpreters, "The earliest conception of public justice was a solemn waiver on the part of the community of its right and duty of protection in the case of one who had wronged his fellow member of the folk....It was the demand for such a withdrawal of the public protection that constituted the trial, and the folk were the only judges of the demand¹." As the king grew more powerful his justice superseded the justice of the folk. Great offenders were able to set

¹ Green, *Conquest of England*, ch. 1, pp. 23, 24. I have taken from this work most of the examples of early English laws that appear in the following pages.

at naught the decisions of the local assemblies, but they stood in awe of the force which the king could direct against them. Accordingly the royal courts gained in authority, and the royal law grew in volume and importance.

But the first efforts of the newly-organized state authority were directed to the regulation of private vengeance rather than its abolition. No attempts were made to suppress it. Probably no desire was felt to do so. But the law hedged it about with conditions and restrictions, so as to make it into a rough instrument of justice. From the beginning custom had forbidden secret assassination. The deed was to be done openly, and there must be no attempt to conceal it. The laws of our early Saxon kings contain many provisions for limiting and directing the exercise of the right of retaliation and revenge. Alfred allowed the death of a murdered man to be avenged by his kindred, but they were to seek the slayer in his house, and were to surround it for seven days before they made their attack. During that time the wrong-doer was to decide whether to surrender and make the money payment which was regarded as satisfaction for his crime, or to await an assault and take his chance of repelling the foe. Edmund declared that the kinsmen of the slayer were not to be bound to take up his quarrel, and if they chose to forsake him, the relatives of the slain were to take no vengeance upon them. Edgar ordained that the man from whom tithe was due was first to be formally requested to pay it, but that if he obstinately refused, the King's Reeve, the Bishop's Reeve, and the Mass Priest of the Minster, might take it by force for the Minster to which it was due. This last law throws a strange side light upon the

condition of society in those early times. We do not wonder at such things as the permission to slay the violator of family honour who was caught in the act, but the evidence of habitual violence and conflict becomes startlingly strong, when we find that ecclesiastics, pledged by their profession to peace, were expected to recover their dues by the might of their own arms.

The examples we have given are taken from the laws of England, but the principle which underlies them is seen in operation universally. Everywhere we find the rude state organization of primitive times used for the purpose of imposing bounds upon the gratification of the wild passion of revenge. The law endeavoured to tame and curb it, and direct it towards just ends by regular means; but it did not at first attempt to substitute for it the calm decisions of an impartial tribunal and punishments inflicted by state officials according to the gravity of the offence. But in time this latter stage was reached. Social life grew more complicated, organization more perfect, authority more powerful. Restraint begot the desire for further restraint. The advantages of rudimentary order were so evident that men accepted a more perfect order with little reluctance. Civilization progresses by means of a perpetual conflict between the anarchical elements of human nature and those which bind society together. A great advance was made when private vengeance was brought under state regulation. The organization of courts to try offences and distribute punishments, and the development side by side with them of a true criminal jurisprudence, marked a still further advance. But for a long time the process before the tribunals was regarded rather as an alternative to the blood feud, than as a substitute for it. The right of

private war remained long after the king's justice had succeeded to the justice of the folk, and the king's courts had become well-organized and powerful institutions. Sometimes we find recognition of this in the laws themselves. Thus the great emperor Frederick I., in an important and solemn regulation for the preservation of the peace of his dominions, "reserved to every one a right to do justice to himself, provided he gave three days' notice to his adversary¹."

The feudal System lent itself readily to the practice of private war; and where the central authority was weak, the feuds of the barons deluged the country with blood. The vassals, as well as the relations, of the injured man were bound to help him in his quarrel, and, as the same obligation existed in the case of the aggressor, considerable forces were often arrayed on either side. In France, where the kings had little power to restrain their great feudatories, an elaborate code sprang up for the regulation of private war². It might be resorted to only when such crimes as the tribunals would punish with death had been committed. The injured person could demand the aid of all his relations to the fourth degree. A refusal to obey the summons was equivalent to a renunciation of relationship, and all the rights of succession to property which it implied. Vassals were bound to follow their lord in private as well as in public war, but the blood feud did not attach to them personally. As soon as the period of service in the field was over they were free to return to their homes, and they could not be attacked except while on actual duty. Before hostilities began, a formal declaration of

¹ Ward, *History of the Law of Nations*, Vol. 1. p. 361, note.

² Ibid. p. 348, *et seq.*

war had to be made; and all the relations who had taken up arms in the quarrel had to be consulted in the negotiations for peace. Nothing of this kind was allowed to grow up in England. Our Norman kings understood too well what feudal license meant, and set themselves with grim determination to be masters in their own dominions. Private war indeed there was; but instead of being regulated by law, it was regarded as lawless. The king's courts were open, and all men were expected to submit to them. What had at first been the only means of punishing offenders was now looked upon as itself an offence. In other realms the same view came in time to be held. As the central power grew strong, it endeavoured everywhere to crush out family feuds, and gain for the state tribunals jurisdiction over all offences. Christian influences acted in the same direction. The vengeful feelings of the injured party were seen to be a most unjust measure of the enormity of the crime and the severity of the punishment. Disorder and bloodshed were condemned by the canons, and the authority of the temporal magistrate exalted. Popes and kings set themselves against the practice of private war. It was no longer recognized and regulated; but the law of the Church and the law of the State combined to forbid it. For a long time it continued to exist in spite of all prohibitions. But it gradually died out as state organization improved, and the unbridled passions of primitive man became more amenable to control under the influence of ever-increasing civilization. In Germany it ceased at the end of the fifteenth century; in Spain it was not put down till early in the sixteenth; after the Wars of the Roses, it was no longer known in England; and in the Highlands of Scotland it lingered till the

clans were finally reduced to order after the rebellion of 1745.

In the foregoing account of private war no less than four stages of development may be discerned. At first every man has to protect himself, and the injured party depends entirely for redress upon his own and his family's power to secure it. Then the customs of the community, and the laws promulgated by its rulers, impose limitations upon the right of private vengeance. It is regulated and directed, but not forbidden. Though limited in operation, it still remains the chief if not the only means of punishing wrong. The third stage is reached when side by side with it there exists in full operation an alternative method of doing justice between man and man, and making criminals suffer for their misdeeds. This method is that of trial before impartial state tribunals, who decide each case on its merits, as administrators of a passionless law. So great are the advantages of this system that both spiritual and temporal rulers bend their energies to the task of securing its universal adoption. In time their success is complete; and the fourth stage is marked by the entire abolition of the old right of unregulated and self-inflicted vengeance. Looking back on the record of human progress, we can see that the passions of early man were so strong, and his reason so weak, that nothing but the wild justice of revenge would satisfy him. We trace the gradual rise of state authority, as organization proved to be a mighty power in the struggle for existence. We observe how that authority first sought to regulate the use of force in private feuds, and then provided an alternative in the tribunals which it established and armed with coercive power. The next step shews us the survival of the fittest in the increase of the authority of the courts

of law, and the decay of private war. At last civilization banishes the vendetta altogether, and civilized man regards it as a mark of barbarism, when he observes it in less advanced communities.

The various stages we have just distinguished from one another are not, of course, separated in history by well-defined lines of demarcation. We cannot lay our fingers upon certain dates, and say here private vengeance began to be regulated, or here courts were established ; nor can we assert that when the period of state tribunals arrived no more was heard of unrestricted bloodshed, or that when private war was forbidden altogether it did not sometimes take place. The growth of new institutions is quite compatible with the continued existence of old ones. The former increase while the latter decrease, till at last they fade away altogether and leave their rivals in sole possession of the field. In one sense they are the creatures of human will, because in every stage of their growth they are fashioned by human hands according to ideas existing in human minds. But they are not planned from the beginning in their final shape, nor do their earliest germs bear much resemblance to the forms they assume in full-grown maturity. In the same period of history we may find blood feuds and law courts existing side by side. When we say that they belong to different stages of human progress, we mean to assert that private vengeance existed long before public tribunals, and that public tribunals will exist long after private vengeance has been forgotten. If this explanation be borne in mind, we shall not be held guilty of inaccuracy when we describe the history of private war as the record of a development in four well-marked stages.

We must now turn to the consideration of public war. There is such a remarkable resemblance between its history and the earlier parts of the record we have just been studying, that I cannot but think the analogy will hold good still further, and that in future ages some rational method of settling disputes between states will be substituted for the rough arbitrament of force. War between savage tribes is marked by the unrestricted indulgence of man's fiercest passions. Conquered enemies are enslaved, or tortured, or even eaten. Whatever hatred suggests is done without stint or limit. The actual fighting is carried on in the most ferocious and bloodthirsty manner, and when it is over the vanquished are made to drain the cup of misery to the last bitter drop. The sculptured records of Assyrian conquest shew mounds of human heads as the proudest trophy of a victorious king. The Red Indians of North America habitually tortured their prisoners. The chiefs of Fiji within living memory made war upon each other in order to obtain provisions for their cannibal feasts. These cases are but types and instances selected from a countless host. The more perfect is our acquaintance with the history of savage warfare, whether in ancient or modern times, the less likely shall we be to dispute the proposition that its characteristic is absence of restraint. Just as in the first stage of the history of private war the passions of the injured individual were the measure of the severity of the punishment, so in the corresponding stage of the history of public war the passions of the conquering tribe are the measure of the atrocities they inflict upon the vanquished. Whatever their cruelty or lust impels them to do is done without remorse. Hatred holds high carnival, and nothing but satiety brings its

revels to an end. Even religion inspires no pity. Often it adds to the horrors. The gods demand their victims; and the noblest of offerings is the blood of a captive foe.

In the second stage the resemblance between the history of public and private war is as complete as in the first. We see in the records of the blood feud, regulation and limitation of individual impulses by the custom of the community or the commands of its rulers. In the accounts of international struggles we trace the gradual growth of a body of customary rules, which curb the ferocity of combatants, and introduce mercy and good faith into a sphere of conduct from which they had before been absent. The tacit consent of civilized states takes the place of the public opinion of the community. Their express consent may be likened to the definite commands of the legislative power. Custom first and law afterwards set limits upon the old right of unrestricted vengeance in private affairs. In the same way in the wider society of independent states customs arose in restraint of the old right of indiscriminate slaughter, and in recent times carefully formulated rules have been added by definite agreement. Such are the provisions of the Declaration of Paris with regard to warfare at sea, and those of the Geneva Convention with regard to hostilities on land.

In point of time national organization preceded international organization. Men felt that fellow citizens had duties towards one another long before they recognized that states were in a similar position. And when at last the idea of an international society arose, there was involved in it the notion of a law of war. At first such law was held to apply only to those tribes who

were of kin to one another. If hostilities arose between them, some restraint was put upon their ferocity ; but outside the circle of real or supposed blood-relationship, no duties were owing, and no restraint was imposed. In ancient Greece, for instance, the various city states considered themselves bound to be much less cruel in their wars with each other than they were when they fought with barbarous foes. But in time it came to be seen that states, as such, had mutual duties to perform ; and accordingly a rudimentary code applicable to all kinds of public war came gradually into being ; and among the states which have advanced together in Western civilization it has grown into an elaborate system of rules. The object of these rules is not to abolish war, or to substitute anything else for it, but to deprive it of its worst horrors, and to make it as merciful both to combatants and non-combatants as it is possible for the business of mutual slaughter to be. They are in this respect exactly like the restrictions placed by custom and early law upon private war. The two sets of rules are also alike in that both grew up very slowly and very gradually from small beginnings, and both became in time voluminous and fairly effective as public opinion was more and more won over to approve them. We have shewn by examples how the right of private vengeance was hedged in on all sides by restrictions before it was finally prohibited. We cannot here trace in detail the growth of similar restrictions upon the ferocity of early warfare. So vast and complicated a subject would require far more space than we have at our disposal. But it is possible to take a small portion of it, and shew therein the operation of the same law of development which runs through the whole. A brief

record of the treatment of prisoners of war will serve the purpose excellently.

It was the custom of early times either to kill prisoners or to reduce them to slavery. This was done by the most advanced as well as by the most barbarous states. The Romans led vanquished kings and generals in triumph through the streets of their city, and then starved them to death in the dungeon of the Capitol. Slave dealers accompanied their armies, and every war gave fresh droves of human cattle to the markets. Long after the slaughter of prisoners had become obsolete, the practice of making them into slaves continued. In comparatively modern times, and among civilized and Christian nations, we find them not indeed sold into domestic servitude, but kept in a kind of state slavery. The Spaniards sent prisoners of war to the galleys all through the seventeenth century, and the British deported the vanquished Irish to their colonies. As the Dutch did not employ slaves themselves, they sold their Algerine prisoners to the Spaniards. Even Grotius admits a strict right to enslave all persons whatsoever who are taken in a regular war; but he hedges this right round with many restrictions¹, and declares that Christians ought not to reduce one another to slavery, but should rather be content with ransom². The custom of allowing prisoners of war to ransom themselves took its rise in the middle ages. Captives were held to belong to their individual captors, who made a bargain with them for a pecuniary payment in consideration of release. The common soldiers who could not raise any ransom money were vilely treated and sometimes slain,

¹ Compare chs. vii. and xiv. of Bk. III. of *De Jure Belli ac Pacis*.

² *De Jure Belli ac Pacis*, Bk. III. ch. vii. § 9.

as for instance in 1441, when Charles VII. of France exposed English prisoners to the people of Paris chained together like dogs, and then threw bound into the Seine those among them who were too poor to redeem themselves from captivity. About the time of our King Edward III. the custom arose for a king or general to buy prisoners of rank from their captors. Thus Edward bought John of France for 10,000 livres, and afterwards fixed his ransom at £1,500,000 of our money. Sometimes prisoners whose ransoms were known were given by one person to another, or transferred in payment of a debt like cheques or bank notes. The next step was to have a fixed scale according to which the king could purchase prisoners of high rank from those to whom they had surrendered. After that a ransom scale was fixed for all prisoners. In the seventeenth century international agreements for ransom according to a fixed scale came into vogue, and the requisite funds were provided by the state. About the same time we find exchange, which had been mentioned with approval by Grotius, becoming common as an alternative to ransom, and sometimes states joined the two together in one agreement. The date of the last cartel for ransom is said to be 1780. From that time onwards exchange remained the sole method whereby belligerents could during the war obtain the release from captivity of their soldiers and sailors who had fallen into the hands of the enemy. But in modern times a modified degree of freedom is often granted to prisoners by accepting their parole. That is to say they give their word of honour not to fight against their captors during the war, or they pledge themselves not to leave a definite district. In the first case they are set at liberty altogether, and

in the second they are allowed to range at will about the district in question. Generally release on parole is a favour granted to officers only; but there are instances of whole garrisons being allowed to depart unmolested on giving a pledge not to serve again in the same war.

We can thus trace the various steps in the growth of humaner usages in one department of the laws of war. The same progress may be observed in other portions of the field. It has gone on for many centuries, sometimes very slowly, sometimes at a fairly rapid rate. Here and there we can point out a period when some retrograde steps seem to have been taken. But such periods are rare exceptions. The law which runs through the history of warfare is a law of development. In the earliest stage of all there are, as we have seen, no restraints on the exercise of the foulest passions of the victorious belligerent. In the second stage restrictions are found. At first they are few and rudimentary; but in time they grow into an elaborate code. They thus shew a close resemblance to the limitations imposed by custom and law on the exercise of the right of private vengeance.

It will be remembered that the third stage in the history of private war was reached, when the state provided tribunals to which injured persons could resort for justice, instead of endeavouring to redress their own wrongs. Two conditions were necessary in order to make their creation possible. There must have been a growing opinion in the community that blood feuds between families were crude and unsatisfactory methods of punishing wrong-doers, and there must also have been a central authority capable of establishing courts and enforcing obedience to their decisions. At first, no

doubt, the state official who endeavoured to compose the disputes was more of an arbitrator than a judge; but he very soon became an arbitrator whose sentences could not be trifled with; and the next step in advance made him a judge, and gave him a jurisdiction over crimes quite independent of the will of the injurer or the injured. Now it seems to me that in the matter of wars between states we have reached a point which may be described as exactly corresponding to the beginning of this third stage in the history of private war. We have begun to regard international conflicts as barbarous. Public opinion is by no means unanimous, but its tendency is in the direction indicated. No statesman now would say in Parliament as Bacon said in 1607, "And certainly, Mr Speaker, I hope I may speak it without offence that, if we did hold ourselves worthy whensoever just cause should be given, either to recover our ancient rights, or to revenge our late wrongs, or to attain the honour of our ancestors, or to enlarge the patrimony of our posterity, we would never in this manner forget the considerations of amplitude and greatness, and fall at variance about profit and reckoning, fitter a great deal for private persons than for Parliaments and Kingdoms¹." The assumption that a policy of war was the natural and proper policy for this country; the classification among its just causes of the lust of conquest and the desire of honour; and the calm contempt expressed for calculations of its profit or loss, strike us as entirely out of keeping with the habits of thought to which we are accustomed. And in the same way we should feel astonished, if a modern ruler openly

¹ Speech on the apprehended influx of Scots into England. Spedding, *Life of Bacon*, Vol. III., p. 314.

expressed himself after the fashion of Henry IV. of France when he received a book written by James I. of England. "It is not the business," said he, "of us Kings to write, but to fight." This was regarded at the time as a pointed saying, which set forth at the expense of the British Solomon the highest conception of the kingly office. In our day it is held that the true functions of a king include neither authorship nor generalship, but that if he must undertake one or the other, he had better write than fight. Government, not destruction, should be the first care of rulers. The power to direct peaceful progress is more important than proficiency in the art of war.

During the last three centuries public opinion has made great progress in this matter; and though the old ideas of the inherent glory and nobleness of war are still strong, they are no longer dominant. They are survivals of a time when war was a necessary agent in the progress of civilization. In the period of nation-making the strength to strike hard blows was an essential element of success in the struggle for existence. The virtues of courage and endurance, the capacity to submit to discipline and to sacrifice the individual self for the good of the community, were learned in the rough school of constant warfare. The nations who possessed them in the most marked degree developed "the wrestling thews that throw the world," and became the victors in the struggle for existence. But civilized states have passed through the period of which we have been speaking, and have entered upon a period of growth, in which war is no longer a necessity except under circumstances of extreme rigour. Sometimes, even in the present age, it happens that a nation has to choose between war on the one hand

and dishonour or ruin on the other. In such a case it should accept the former alternative; but the enemy who forces it to make the choice is guilty of an enormous crime. Whenever it is possible governments should be willing to submit their disputes to arbitration; and the fact that within the last few years an increasing number of them have done so, seems to shew that opinion among rulers and peoples is setting against war, and towards the creation and adoption of some alternative means of settling international disputes.

We have traced two stages in the history of public war exactly corresponding to the first two in the history of private war; and we have seen that the parallel may be carried still further, because in recent times arbitration has come to be regarded as a practical alternative to war, just as a trial before a law court was regarded of old as an alternative to a family feud. When once courts were constituted they had nominally the force of the state behind them to compel obedience to their commands. But I question whether it is possible for us to realize how little this meant for many ages. We are so accustomed to the absolutely irresistible power of modern tribunals, that we can with difficulty picture a state of society in which the great and rich were for all practical purposes above the law. Not only, however, did they evade or defy it, when they themselves should have come within its clutches, but they perverted it into an instrument of injustice and wrong in their dealings with their weaker neighbours. One great reason why in England the king's law and the king's justice superseded the unwritten customs and the rough justice of the folk, was because the king alone was able to strike straight at great offenders, and compel them to submit to the

decisions of his judges. But anarchy died hard. Long after the Norman and early Plantagenet Kings had organized a strong central authority in the realm, we read of powerful barons setting at nought the decisions of the ordinary courts and the authority of the ordinary judges. Courts like the famous Star Chamber were originally created to bring the force wielded by the king to bear directly and immediately upon powerful malefactors, who would otherwise have escaped unharmed. In time they became the instruments of tyranny; but in their inception they supplied a need that was sorely felt, and performed functions which the community could ill have dispensed with. The creation of a strong executive was a slow process extending over centuries. The growth of habits of self-restraint and respect for law in the community was a slower process still. Indeed it is not yet complete; for there exist in the most advanced states many thousands of human beings who are at perpetual war with their kind, and neither have nor profess to have the slightest reverence for authority. The existence of the habitual criminal class is a perpetual reminder that, with all our boasted civilization; we have failed entirely to reclaim a considerable proportion of our population from primitive lawlessness.

I mention these facts in order to shew how little foundation there is for the objection commonly urged against a wide resort to arbitration in disputes between states. We are told with painful iteration that there is no common superior to enforce obedience, and therefore it is hopeless to expect general submission. Exactly the same objection might have been urged against state tribunals in the rudimentary stages of their growth. "It is all very well," people might have said, "to submit a

dispute here and there to the arbitration of a state official in whom we have confidence, but the notion of having all our quarrels settled in the same manner, whether we like it or not, is absurd. And besides, how can anyone among us who does not choose to give up his right as a freeman to be his own avenger, be compelled to do so by this new-fangled authority?" This and much more in the same strain might have been said. Very likely it was said by some of the ablest men of the time. But nevertheless courts went on developing. Opinion in favour of their interference grew. In time the central authority became strong enough to forbid private war altogether: and at last it ceased to exist.

Now in international affairs we have at present advanced only just beyond the stage of being quite satisfied with a regulation of the methods a state may use in fighting out its own quarrels. We have come to see that public war is at best an unsatisfactory method of settling international disputes. We have begun to wake up to the fact that states may decimate their manhood, and destroy their material resources, in endeavours to obtain for themselves justice, and then after all discover that they have done nothing more than prove which of them is most apt at the business of wholesale destruction. And in this state of mind we have welcomed arbitration as a passable alternative to war. No doubt our arbitral tribunals are of the most rudimentary kind. But so were state tribunals when they were first instituted. Yet they developed into the highly organized and splendidly effective courts of justice with which we are now familiar. I can see no reason for despairing of a similar development in the case of international courts. The analogy between the two processes has been so close and con-

tinuous hitherto, that we have good ground for hoping it will not suddenly break off.

But we need not rely entirely upon the argument from analogy to prove that the present imperfect process of arbitration will develop into an effective means of settling all ordinary disputes between nations. The development has already begun. Till almost yesterday arbitral tribunals have been constituted on the spur of the moment, after the quarrel has broken out and other means of settling it have been tried in vain. But within the last year or two the practice has arisen of inserting in treaties of commerce clauses binding the contracting parties to refer to arbitration any differences which may arise between them with respect to the subject-matter of the treaty. This is a distinct step forward, and it is due to the initiative of Signor Mancini, till lately Italian Minister for Foreign Affairs. During his tenure of office it fell to his lot to make or renew many treaties of commerce between Italy and other countries, and in every one of them he succeeded in inserting an arbitral clause. A nobler work for humanity has seldom been more quietly and unostentatiously accomplished; and if he is able to make further progress with it he will go far to realize the prophecy of Mazzini, that

“Following the Rome which wrought by force of arms,
Following the Rome which wrought by force of words,
Must come, so it was shewn me long ago,
The Rome which yet shall work by force of life¹.”

After some experience of the beneficial effect of referring disputes connected with their commercial affairs to arbitration, states will probably desire to

¹ Mrs King, *The Disciples*, p. 172.

extend the principle of peaceful settlement to other matters also, and nothing is more likely than that they will negotiate treaties binding themselves to abide, in all future questions that may arise between them, by the decision of a Board of Arbitrators to be appointed according to a plan embodied in the agreement. Here again we are not left entirely to conjecture; for a general Treaty of Arbitration has already been negotiated between the United States of Columbia and the Republic of Honduras. By the first article the contracting parties "enter into a perpetual obligation to submit to arbitration, whenever they cannot be arranged by their ordinary diplomacy, the differences and difficulties of every kind, which may henceforth arise between the two nations¹"; and by the third article they pledge themselves to take the first opportunity of negotiating similar treaties with other American states. The treaty provides a special method for the selection of an Arbitrator; and the two powers agree that, in case of any dispute about the appointment, the President of the United States for the time being shall be requested to act. Nor is this treaty the only one of the kind in existence; for in 1883 Switzerland proposed to the United States, to Mexico, and to some other American Republics, that they should enter into a general Treaty of Arbitration. Her overtures were favourably received; and the powers in question are now bound to refer any difference they cannot settle by negotiation to the decision of a tribunal composed of three members, one to be nominated by each of the parties to the dispute,

¹ Quoted from a paper by Mr Henry Richard, M.P., read at the Milan Conference of the *Association for the Reform and Codification of the Law of Nations*, Sept. 12, 1883.

and the third to be chosen by the other two, or, in case they should disagree, by some friendly state.

No doubt it will be urged that most of the powers just enumerated, as having embodied the principle of arbitration in a general treaty applicable to all their disputes, are weak and insignificant. It is impossible to contest the truth of this remark; but we must remember that great movements generally begin on a very narrow scale. Moreover by the adhesion of the United States the principle has received the support of one of the great world-powers whose policy will help to shape the future of mankind. The development of International Arbitration within the present century has been enormous. At the beginning it was as difficult to find a case where it had been successfully applied, as it is now to find a treaty providing for its use in all questions that arise between the contracting parties. But nevertheless the disputes submitted to arbitration steadily increased both in number and importance, and in the last few years the arbitral clauses we have described have been inserted in about twenty commercial treaties. With these facts before us we have every reason to believe that the further development of the arbitral process, which is exemplified in the treaty between Columbia and Honduras, will not abruptly terminate at the point it has already reached, but will go on further and further till all civilized states have adopted it.

We now see clearly that the analogy between public and private war holds good in the third stage of their history, just as it did in the first and second. But we must remember that international courts are not at present as well organized and effective as state courts. The alternative to public war is not yet in the same

efficient condition as was the alternative to private war before the blood feud could be abolished. A central authority is required to coerce refractory states, and make the decisions of the Boards of Arbitration respected on all sides. I have little doubt that such an authority will arise as the need for it becomes keenly felt. We have first to improve the tribunals, and make them so strong in ability and in the support of public opinion, that the nations will clamour for the coercion of any power which sets at naught their judgments. When the general sentiment is outraged by disobedience, means will be found to compel obedience. Probably many states will before long enter into general Treaties of Arbitration; and in time standing tribunals will be created in consequence of the increasing frequency of cases, just as in England judicial work, which was at first the occasional duty of the great officers of the royal household, came afterwards through press of business to be the special function of professional judges. May we not hope that, when this stage is reached, the Concert of Europe will supply the coercive force which will, no doubt, be occasionally needed? Inasmuch as the tribunals will be created by the express agreement of states, we may reasonably expect that their decisions will not often be rejected: and it does not require a great stretch of imagination to surmise that, when anything of the kind takes place, the Great Powers will be called in as a sort of Court of Appeal, to decide whether the disobedience is justified, and, if not, to compel the submission of the offending state. I need not repeat here what was said in the previous Essay on the subject of the superintending authority exercised by the European Concert. If the existence of such an authority has been

satisfactorily proved, we may well believe that it will be utilized in the manner described above. On the American Continent, to which its primacy does not extend, there are signs that its place will be taken by the Government of the United States.

We thus see reasons for believing that the Evolution of Peace is not the wholly chimerical thing some writers and thinkers represent it to be. Yet we cannot join those noble enthusiasts whose judgment is so far overbalanced by their feelings that they hold the abolition of war to be possible, if not in the present, at any rate in the immediate future. Now and for a long time to come nations must remain armed if they mean to retain their possessions; and even if international morality were suddenly raised to that higher plane where aggression would be an unheard of offence, it would still be necessary to keep up a small armed force to do police duty among barbarous tribes. A gradual reduction of the bloated armaments of modern times we may indeed hope for; but it will come as an effect, not as a cause, of the infrequency of war. Anything like a general disarmament is impossible while causes of quarrel lie thick around, and a state taken unprepared is liable to be overwhelmed in a month by the highly organized armies of its foe. I, therefore, place the diminution of wars by means of Arbitration before a great reduction of armaments, as a practical object to be aimed at. When peoples see that few quarrels lead to war, they will refuse any longer to bear the terrible burdens they undergo at present with more or less cheerfulness as a sort of insurance against national ruin.

But though it may be necessary for Empires like our own to have for some time to come a giant's

strength in war, it is not necessary that they should use it for purposes of aggression. The strong man armed, of whom we hear so much, need not be a bully. He may scorn to use his strength for any purpose but the defence of his undoubted rights; and he may prefer to leave his claims to the decision of an impartial tribunal, rather than to enforce them by the might of his own hands. And this is just what we believe there is a tendency among civilised states to do. Peoples and rulers are slowly coming to regard war as a calamity to be avoided by all honourable means. We need not waste time in an attempt to reply to the cheap sneers of those who habitually mock at the moral and spiritual forces by which the world is in the long run ruled. The clever cynics of to-day may be left to their comfortable belief in the permanence of savagery. It is demonstrably false; but no demonstration will ever convince them that justice, mercy and truth are great powers in human life. To objectors of another kind, who feel compelled by the pressure of hard facts which they cannot ignore to refuse credence to any theory of an advance, however gradual, towards perpetual peace, a very different answer is due. It is said that the international conflicts of recent times have been numerous and severe, and that in no single year from 1815 to 1860 has England been free from war, or from some dispute likely to lead to war. We may, I think, at once claim the disputes which were likely to lead to war, but did not, as evidence on our side of the argument. Their settlement without resort to hostilities shews a pacific disposition among the parties to them. With regard to the wars themselves, very few of them were waged in Europe. Of these few only one, the Crimean War, was a great

struggle; and the rest were small affairs of reprisal or intervention. The great majority of our wars during the period in question were waged against barbarous or semi-barbarous peoples. Many of them were mere measures of police; and the Indian Mutiny was the only one that rose to serious dimensions. If we take, as for the purpose of the present discussion we clearly ought, only severe struggles between civilized states, we shall find that the present century has seen six, whereas there were no less than ten in the first eighty years of the last century. This, apart from the fact that recent conflicts have been conducted in a far more humane manner than those of a century ago, would seem to support the contention that among civilised states the combative element in the national life is dying out by slow degrees. Perpetual peace may be a dream; but the foremost peoples of the world are beginning to dream it. And we may say with the American poet and diplomatist who has so lately left our shores,

"The dreams which nations dream come true,
And shape the world anew.

* * * * *

And down the happy Future runs a flood
Of prophesying light;
It shews an Earth no longer stained with blood,
Blossom and fruit where now we see the bud
Of brotherhood and right."

We hold, then, that the germs from which a satisfactory system of International Arbitration may be developed are already in existence, and judging by the analogy of state tribunals there seems every prospect of their growth. In proportion as they become strong public war will be waged with decreasing frequency, just as private war decayed under the influence of Courts of

Law, I doubt, however, whether arbitration will be found an efficient substitute for all kinds of war. What we may call mere business disputes between states can always be settled by it. Questions connected with such matters as boundary lines, tariffs, indemnities for injuries inflicted upon the subjects of one state by officials belonging to another, fishery claims, and other similar affairs, need never lead to hostilities when there is in existence an impartial tribunal to which they can be referred. But questions which are intimately connected with national passions and national aspirations, and questions which are vital to a nation's safety, will never be left to arbitration. Whether the passion be good or bad, if it has once gained overmastering force among the people of a country, they will gratify it, even at the risk of conflict. The mutual hatred of Frenchmen and Prussians, and their opposing interests with regard to the lands along the Rhine, would sooner or later have driven the two countries into war, even if the question of the Hohenzollern candidature for the throne of Spain had been settled in 1870 by the intervention of the Great Powers, as was the Luxemburg question a few years before. The passionate aspirations of Italians and Germans after the political unity of their respective fatherlands were the cause of many a war, which the decisions of a Board of Arbitrators would have been absolutely powerless to prevent. Moreover, the deliberate judgment of the reason may be a force as incapable of restraint as the hot impulses of excited feeling. The English people, for instance, have made up their minds that to allow the Suez Canal to be closed against them would be to consent to the ruin of the Empire, and they would unanimously decline to submit such a question to

arbitration. Each state must be the guardian of its own safety. It cannot allow its independent existence to be calmly discussed and adjudicated upon by an external tribunal.

Are we, then, reduced to the conclusion that public war will never die out? Must we hold that the resemblance between its history and that of private war, which we have seen to be so close in the first, second, and third stages, will fail when we come to the fourth? I think not. We have seen that public war has reached a point corresponding to the beginning of the third stage in the history of private war; and we have found reasons for believing that the similarity will be continued through the remainder of that stage. When Arbitral Courts are fully established, what we may term wars of business will cease. But wars of passion and wars of self-defence will still remain. Yet influences are at work which will in time render them very rare, and perhaps finally abolish them entirely. The passions of individuals have been restrained by centuries of civilization, till they are no longer the uncontrollable forces they were in primitive times. The same process is going on with the passions of states. The strong and growing modern feeling against war is at once the evidence of progress in this direction, and one of the means whereby it is effected. And further, every change for the better in the political order of Europe due to the gratification of some great national aspiration, is a new security for peace. The forces that made for war in one set of circumstances, make for peace when a better set is substituted for the old ones. Now that Italy and Germany have been unified, the feelings of Italian and German patriotism, which in the last generation were potent causes of blood-

shed and turmoil, support and strengthen the existing order of international affairs. At the present time the Pan-Sclavonic and Pan-Hellenic agitations are disturbing forces, but as soon as the Sclavs and the Greeks are gathered together under a rule they approve, the feeling of nationality which causes these agitations will be enlisted on the side of order. In short as civilization progresses, states will be less bellicose; and as the distribution of power and territory in Europe becomes more just, peoples will be less disposed to fight for a change in their destinies. As Europe advances to this stage, it will be her duty to aid in the development of the more backward quarters of the globe, and to exercise police authority over barbarous races. Thus in time, by the slow and gradual operation of forces which are already in existence, war will be entirely abolished. Our descendants in the far future will look back upon it with the same mixture of wonder and contempt with which we look back upon the blood feuds of our remote ancestors. Meanwhile we ought to help with all our power every movement in favour of the bloodless settlement of international quarrels, and to restrain as far as our influence extends the combative elements in international society. Thus in our own day and generation we may do something to lessen one of the greatest evils of humanity, and to hasten that most difficult of all evolutions, the Evolution of Perpetual Peace.

ESSAY VII¹.THE EXEMPTION OF PRIVATE PROPERTY FROM
CAPTURE AT SEA.

THE question of the exemption of private property from hostile capture at sea is one of the most important issues which can be put before the people of this country. We are islanders; we live by trade and manufacture; we import an ever-increasing proportion of our necessary food; we possess a vast Empire extending over every quarter of the globe, and demanding our protection in every sea; we have a larger mercantile marine, and a more powerful fleet of war-ships than any other country; and about two-thirds of the carrying trade of the world is done by our vessels. Not only is our policy in naval matters of the utmost importance to ourselves, but it also affects

¹ The figures in this Essay have been taken from sources too numerous to mention. Chief among them are the *Statistical Abstract*, the *Navigation Returns of the United Kingdom* the *Statesman's Year Book*, the *History of British Commerce* by Professor Leone Levi, and James's *Naval History*. Among the articles and pamphlets from which I have derived valuable information should be mentioned Mr W. E. Hall's paper in the *Contemporary Review*, for Oct., 1875, and the series of communications to the *Pall Mall Gazette* evoked by its publication in Sept., 1884, of *The Truth about the Navy*.

the interests of all civilized peoples. It behoves us, therefore, to review it carefully from time to time, lest new conditions of warfare and changed circumstances of commerce should have rendered obsolete and even dangerous rules which we once found by experience to be essential to our security and conducive to our greatness. Moreover there is a responsibility laid upon us, as the foremost naval power in the world, so to guide the development of maritime law that it may assist, and not retard, the progress of peace and civilization.

There cannot be the slightest doubt that for a century past the views of statesmen and jurists both on the continent of Europe and in America have been pronounced with increasing emphasis in favour of the prohibition of the capture of private property at sea, unless such property happens to be contraband of war or engaged in an attempt to break blockade. The one short-lived treaty with Prussia negotiated by Franklin in 1785, the rejected motion in the French Assembly in 1792, the isolated judgments of one or two writers of no great distinction, have been the springs of a mighty current of opinion, which has shewn its force in modern times by the prohibition of such captures in the Seven Weeks' War of 1866, the treaty of 1871 between the United States and Italy, the twice-repeated decision of the Institute of International Law, and the almost unanimous voice of the great continental jurists. In 1856 the new principle would have been embodied in the Déclaration of Paris, had not the opposition of Great Britain caused the rejection of the American proposition in its favour. Having agreed to give up for the future the right of capturing enemy goods under a neutral flag, our statesmen declined to go further along the path of concession

to commerce. The immediate result of their action was a refusal on the part of the United States to sign the Declaration. But, though they were unwilling to pledge themselves to what they regarded as a dangerous half-measure, they have not given up their traditional policy of endeavouring to secure exemption from capture for private property at sea ; and in this they have the sympathy and support of all the great continental states of Europe, with the doubtful exception of France.

The proposed change is usually recommended by arguments based on considerations of humanity. We are told that the state of war exists only between the combatants on either side, that maritime capture is a relic of ancient savagery, and is no more defensible than indiscriminate plunder on land ; and we are bidden to follow in our naval operations the beneficent example of the great military powers, who have long ago abandoned the cruel practice of ravaging the country in which the operations of their armies are carried on. A very little consideration will shew that there is a vast amount of exaggeration in such arguments and appeals as these. It is mere trifling to say that warfare on land is waged only between army and army, when legally the outbreak of hostilities places all the subjects of one belligerent in a condition of non-intercourse with all the subjects of the other, when an invader has the right of superseding all the civil functionaries found in occupied territory, when sieges and bombardments cause the utmost misery to the non-combatant population, and when the commander of an invading army can sweep the country bare of provisions in order to maintain his troops, and compel the inhabitants to put themselves and their vehicles at his disposal for purposes of transport. It is quite true that

modern warfare on land is carried on by civilized states with a regard for the welfare of non-combatants which shews a great advance on the practice of not far distant days. Plunder and outrage by individual soldiers is strictly prohibited. An invading army is kept under discipline, and the troops are not allowed to spread themselves like a swarm of locusts over the face of the country. But the right of requisitioning supplies still remains, and affords a standing refutation of the argument that maritime capture would cease, if the laws of warfare at sea were assimilated to those in force on land. It is calculated that in the war which broke out in 1870 the Germans took goods to the value of £16,000,000 from the occupied districts of France by way of requisition: and it may well be doubted whether the strongest naval power could make captures at sea to that amount in seven months of successful warfare.

And if there is no ground for boasting that the laws which govern the operations of land forces spare private property to an extent unknown at sea, neither is there reason for vaunting their superior humanity in respect of the personal sufferings of non-combatants. The capture of a merchantman is as regular a proceeding as the levy of a requisition on a country town. It is carried on under the eye of responsible officers and by their authority; and owing to the comparative smallness of the theatre of operations such excesses as are easy of perpetration in the latter case are exceedingly unlikely to take place in the former. Moreover the absence of women and children removes a moral danger never entirely absent from warfare on land. Nor must it be forgotten that there is no more bloodless means of bringing an enemy to terms than by cutting off his sea-borne commerce, and thus destroy-

ing his material resources in cases where they depend upon his command of the ocean. I venture to assert that in any ordinary struggle non-combatants would suffer more in one month from invasion than in a whole year from the capture of private property at sea.

But while we have ample grounds for refusing to admit the superior humanity sometimes claimed for the usages of warfare on land, we should not let the exaggerations and reproaches indulged in by some continental writers blind us to the real merits of the proposal they support. If there is anything to be said for it on the score of justice and mercy, we ought to give due weight to such considerations, and not content ourselves with proving that existing usages are no worse in the case of fleets than they are in that of armies. As the greatest maritime power in the world, we should rejoice if we were able to carry on naval operations with more humanity and greater tenderness to peaceful commerce than is possible in warfare on land. And certainly some of the arguments brought against the present system are more formidable than most of us are willing to admit. Seizure of private property is only justifiable if its effect upon the issue of the struggle is greater than the misery it causes to individuals. But the conditions of commerce and warfare have so altered in recent times that comparatively few powers are dependent upon their ocean trade for their ability to carry on war. Owing to improved means of communication a state with a land frontier can obtain what it wants from abroad through neutral ports; and though its flag may be driven from the seas, it may undergo no serious diminution of its resources. A great deal of hardship will be inflicted upon its sea-faring population, but its strength for war will be scarcely

touched. No doubt there are a few countries to whom these observations do not apply; and foremost among them, as I hope soon to shew, is our own. But they are exceptions to the general rule. In most cases the capture of private property at sea affects but little the warlike force of the country whose subjects suffer by it. It has attractions for the captors, owing to the fact that the proceeds of their seizures are divided amongst them in the shape of Prize Money; but this is one of the most objectionable features of the system. War should be a solemn national appeal to force when all other means of obtaining justice have failed; and considerations of private gain should be allowed to enter into it as little as possible. I am afraid that maritime capture, owing to the chances it affords of personal enrichment, is often regarded rather as an end in itself than as a means of reducing an enemy to terms. Looking at the matter entirely from the point of view of humanity, the most just conclusion seems to be that the proposed change, though supported by a considerable amount of cogent reasoning, is not imperatively called for. We have to weigh against the general ineffectiveness of the present practice as a weapon of offence its great efficiency in exceptional cases, where it would be the most humane means of destroying an adversary's resources. To strike a just balance would be a most difficult operation. Fortunately considerations of enlightened self-interest point so unmistakably in one direction, as far as this country is concerned, that there can be no doubt as to her true policy. The only difficulty is to get her rulers and people to see it.

In order to make a contribution towards the attainment of this most necessary object, let us sketch as

briefly as possible what are the conditions under which Great Britain would have to fight, if she were suddenly to find herself engaged in a great war.' In 1856 the Declaration of Paris was drawn up; and its second article declared that for the future the neutral flag should cover enemy's goods, with the exception of contraband of war. That Declaration has been signed by nearly all civilized powers, and observed in all maritime wars which have taken place since it was made, even when one or other of the belligerents have not been parties to it. The United States, for instance, in their great Civil War, consented to act upon the principles embodied in it, though they refused to sign it when it was originally drawn up, and still refused to pledge themselves to it for all future time. And again, when they were neutral in the Franco-Prussian war of 1870-71, they received from the belligerents, who were both bound by it, the same immunities for their merchant vessels as were granted to the flags of the other signatory powers. Now a number of rules which have been formally accepted, not only by Great Britain, but by almost all the civilised states of the world, and which have been acted upon without interruption for nearly thirty years, cannot be lightly set aside. If they are not International Law, they are such a very near approach to it that we are practically as much bound to observe them as if they were. We cannot for very shame dishonour our own signature, as soon as we enter into a serious war, after having obtained, as neutrals, from other powers all the advantages given by the Declaration to peaceful commerce. We should be bound to carry on our hostilities in accordance with its rules, if we did not care to face at the same time the

loss of our own self-respect and the determined and perhaps armed opposition of all neutral states. I am not now discussing the question whether it would be wise to withdraw in time of peace from the Declaration, giving fair notice to other powers that we intended to go back to the older rules of maritime capture, and were perfectly willing that they should be put in force against us. That is a possible policy which will be examined later on. What I wish to make clear now is that, if under present circumstances we were engaged in a great maritime struggle, we should be obliged to fight in accordance with the rules we assented to in 1856.

Let us consider what this means. Our armed cruisers would not be able to touch enemy goods found navigating the sea under a neutral flag, unless they were contraband of war. On the other hand the enemy would be restrained from capturing our merchandise, if he did not happen to find it under our own flag. We could capture his vessels, and his cargoes afloat in them; and he could capture our vessels, and our cargoes afloat in them. Nothing could be more fair and even, as far as these rules are concerned; and at first blush it looks as if the power which possessed the strongest navy was certain to prevail in a war carried on under them. But unfortunately for us the issue of a conflict depends not only on the comparative efficiency of the weapon employed, but also on the comparative vulnerability of the combatants. Our navy is, no doubt, the strongest in the world; and we need not enter for the purpose of the present argument upon the controversy as to whether it ought not to be made stronger still. But our commerce is so much larger than that of any other power, and so much more essential to our national existence, that a

successful blow struck against it would have a far greater effect on the fortunes of the war than the utter destruction by us of the mercantile marine of our foe. In 1883 the exports and imports of the United Kingdom were valued at £732,000,000, and those of our colonies and dependencies at £400,000,000, making a total trade of £1132,000,000 exposed to the attack of an enemy. In the same year the exports and imports of France came to £417,000,000, and those of Germany to £331,000,000; while the foreign trade of Russia in 1882, the last year for which statistics are available, amounted to £139,000,000. Thus the first glance at figures shews that our commerce presents an area to attack three times as great as that of any single state among our chief political and commercial rivals, and more than one fourth larger than that of all of them put together.

This is serious enough, yet it is by no means all. Our trade is carried on in our own vessels, that of our possible foes is often entrusted to foreign bottoms: we have a great carrying trade to lose, they have next to none: we import necessities, they luxuries: we should be unable to obtain supplies if our sea-borne commerce was cut off, they could get what they needed across their land frontiers. In order to make good this alarming series of allegations, I will institute a comparison between the circumstances of England and those of France and Russia, the only two European powers with whom there seems the slightest reason for supposing that we may possibly be engaged in hostilities.

The mercantile marine of the United Kingdom consisted in 1883 of over 24,000 vessels with a tonnage of more than 7,000,000. France in the same year

possessed about 15,000 vessels, whose united tonnage amounted to a little over 1,000,000 ; while the merchant ships of Russia numbered nearly 3,000, and their tonnage reached to about 700,000. The foreign trade of Great Britain with all the world is carried on chiefly in her own ships ; for of the 65,000,000 tons of shipping engaged in it which entered and cleared at her ports in 1883, 47,000,000 were British, and barely 18,000,000 foreign. But only one-third of the foreign trade of France, and one-sixth of that of Russia, voyages in French and Russian vessels respectively. In fact we carry nearly all our own goods, and the greater part of our neighbours' also ; and this state of affairs, which is singularly profitable to us in time of peace, would be one of our greatest dangers if we were engaged in war. The rule that the flag covers the cargo allows a belligerent's commerce to be carried in neutral vessels without fear of capture. France, therefore, who already entrusts two-thirds of her trade to foreign ships, has but to transfer the remaining third, and the whole is safe. Russia need only make over one-sixth, and as long as her ports were open she would suffer little loss. But a similar transfer would be a most terrible blow to us. Our carrying trade would be destroyed at once ; and it alone is worth £50,000,000 per annum. The prosperity of the country is bound up with the prosperity of its mercantile marine. If our enormous commerce had to seek the protection of other flags, it would immediately shrink in volume to an extent which would cause the most acute suffering, not only among our merchants, but among the millions of our population who depend upon foreign trade for daily work and daily bread. In fact the remedy would be worse than the disease. We could not

attempt to use the resource which is open to our possible foes. Probably one of the first results of an outbreak of war would be the passing of an Act of Parliament to make the transfer of a British vessel to a foreign flag a penal offence.

The effect of this would be that the whole external trade of the Empire, with the exception of that comparatively small portion which is carried by foreign vessels, would be exposed to the attack of the enemy, while the commerce against which we could strike a blow in return would be a small and rapidly diminishing quantity. If we were at war with France, her cruisers would have at once as a target for their operations a trade worth about £1000,000,000, while our navy would be able to make reprisals on little more than a tenth of that sum; for it could not, of course, touch the 30 per cent. of French trade which goes across the land frontiers of the Republic, and the greater part of the remaining 70 per cent. is, as we have seen, carried on in vessels which are not French. In the case of Russia the disproportion would be still greater; and both countries could, without any serious diminution of their resources or any widespread distress among their people, transfer their mercantile fleet to neutral owners, if our cruisers were successful in their early operations against it.

We see, then, that in the event of war Great Britain is exposed to attack through her trade in an enormously greater degree than either France or Russia. Her chances of injuring them are infinitely less than their chances of injuring her. And what is true of them is true of all the other great civilized powers, with whom alone she could be engaged in a life and death struggle. And, moreover, they would have this further advantage,

that they could make shift to do without what comes to them from over the seas, whereas the destruction of her commerce would be the starvation of her people. The twelve principal articles of import into the United Kingdom are given in the returns as Corn and flour, Raw Cotton, Wool, Sugar, Wood, Metals, Bacon and beef, Animals, Butter and butterine, Tea, Silk manufactures, and Flax, hemp, and jute. Of these, six are food stuffs, and five are the raw material of our manufactures. Without them we could neither sustain life, nor make the fabrics which we barter for the produce of the world. Other great nations import chiefly manufactured articles, which at a pinch they could do without, and export chiefly raw materials and food. They could, therefore, live and fight, if their foreign trade was for a time cut off, whereas we could not. France, for instance, the one among them whose circumstances most nearly approach to our own, is not dependent for subsistence upon supplies from abroad; and Russia not only feeds her own people, but has a large surplus for exportation. Our imports of corn and flour amounted in 1883 to £67,000,000; whereas those of France, when the value of her exports of the same articles are deducted, came to less than £13,000,000; while Russia exported to the United Kingdom alone £11,000,000 worth of them. In other words Great Britain imported for every man, woman and child among her people about 250 lbs. of bread stuffs; France imported about 50 lbs. a head; and Russia exported to this country about 30 lbs. for every unit of her population, in addition to what she sent to other nations. And with regard to animal food we stand in much the same position. A large and rapidly increasing proportion of our supplies

of cattle, beef, bacon, eggs, and even fish, comes from foreign countries. The quantity of each separate article imported varies very much from year to year, but in all there is a steady increase if we take any considerable period for purposes of comparison. The import of beef, for instance, was five times as great in 1881 as it was in 1872. In 1882 it fell off considerably in amount, but in 1883 it rose again to a little above the level of 1881. Taking only the barest necessities, and leaving out of the computation altogether such articles as tea and sugar, which we consume to an enormous extent, but which we might be able to do without if we were called upon to fight for the existence of our Empire, at least one-third of our annual food supply comes from abroad. No change in our fiscal policy could materially alter this state of affairs. There are so many of us that the land on which we live cannot be made to support us all, even if we refuse to admit a single quarter of foreign corn or a single carcase of foreign meat. A return to Protection could not render us self-supporting ; while it would deprive us of the means of buying cheaply the food we cannot raise for ourselves. The only way to make the country independent of supplies from abroad would be to deport or kill about 12,000,000 of its people !

To complete the picture it is necessary to add one more touch. Not only is the volume of our trade exposed to attack in the event of war ten times as great as that of any possible adversary ; not only are we, by the conditions of our existence, debarred from the resource open to an enemy of transferring our merchant fleet to neutral flags ; not only are we dependent upon our sea-borne commerce for the necessities of life, while

our rivals receive from abroad articles they could for a time dispense with; but in addition to all this our insular position renders it impossible for us to obtain what we need across a land frontier, if the sea route is made too dangerous by hostile cruisers. No other great power in the world is in the same predicament. If every French vessel were swept from the sea, and every French port put under strict blockade, the trade of France would simply go to Antwerp and Rotterdam, and she would supply her wants at a slightly enhanced cost by means of the Belgian railways. Her Mediterranean trade could be carried on from Genoa and Venice through Italy and Switzerland; and except in the very unlikely event of such a coalition against her as would close all her land frontiers, she would have little to fear from attacks upon her ocean trade. Similarly Russia would still have the markets of Europe and Asia open to her, if no vessel bearing her flag could shew itself outside her ports. Railways have revolutionized war as well as commerce, as we shall find out to our cost if we are ever again engaged in a gigantic struggle with a powerful continental state.

I have been content thus far to insist upon the terrible comparative vulnerability of Great Britain under the present conditions of naval warfare and international trade. We must now consider whether her maritime forces are likely to be successful in warding off attack. Vast as are the interests we must stake upon the issue of a struggle with any considerable naval power, we might nevertheless be able to contemplate such a contest with equanimity if our means of defence were adequate to the task that would be imposed upon them. Unfortunately I state but the naked truth when

I say that they are not adequate, and further, that it is impossible to make them adequate. Our seamen are as brave, our commanders as skilful, our ships as formidable, as of yore ; but circumstances have so entirely changed that no courage or skill could save our trade from serious disaster, if only one swift hostile vessel got to sea. Our sole chance of security lies in the possibility of immediately capturing all our enemy's cruisers that are at large at the outbreak of war, and penning the rest in his ports throughout the struggle. This was done in the Crimean War, when the powerful fleets of Great Britain and France were combined against the weak navy of Russia. But we cannot count upon doing it again. How little our naval authorities reckon on repeating the performance is shewn by the fact that when war with Russia seemed probable late in 1877, the Admiral in command of the Australian station advised that every sailing merchant ship should be laid up in port in the event of the outbreak of hostilities. We have all the seas of the world to patrol. Our commerce is ubiquitous ; and if we are to protect it efficaciously, we must be as strong at every point as our opponents are at any point. It is not a question of naval superiority, but of naval omnipotence. There are 38,000 vessels at sea flying the British flag ; for we must count the ships of our Colonies as well as our own, since they would be equally exposed to attack. To protect this vast host of vessels scattered over the waters of the globe we have barely 100 cruisers adapted for such service. Of course there are many more ships in the royal navy ; but we could not use our fighting ironclads, or our coast and harbour defenders, or our fleet of torpedo vessels, as watchdogs of the seas. Indeed the number I have

given is rather over than under the mark; for only about a dozen of the 100 vessels mentioned are of the swiftest type, fitted to cope in any degree with an enemy's cruiser which, like the famous *Esmeralda*, can steam 18 knots an hour.

And what would be the result if only one or two such cruisers got to sea under dashing and skilful commanders? This is by no means an unlikely event, nor does the supposition that it may happen cast the slightest slur upon our navy. Its officers and men to-day are as brave and able as those who fought and triumphed under Nelson, and much better trained than they were. Its ironclads are in a much more efficient condition than the strained and leaky hulls which broke the French and Spanish line at Trafalgar. I do not doubt that the enemy's fleets would be beaten, and the enemy's commerce forced to seek the protection of neutral flags, under which, as a result of the concession we made in 1856, it would flourish in perfect safety. Whatever steam and steel can do would be done. But no men can perform impossibilities; and it is an impossibility to protect to-day the whole of our mighty commerce. In no naval struggle in which we have been engaged, with the single exception of the Crimean War, have we succeeded in preventing all the cruisers of the enemy from getting to sea. We could not hope, for instance, throughout the whole course of a war with France to keep every French port close shut. Under the most favourable circumstances a few vessels would get out; and though they might be captured after a short career, the damage they would do would be almost incalculable.

Let us suppose that on the outbreak of hostilities a swift cruiser of the type of our own *Mersey*, or the Chilian

Esmeralda, slipped out from Brest. Our first warning of her existence might be derived from telegrams recounting the non-arrival at New York of some of our finest Atlantic liners. After capturing several of these, and replenishing her bunkers from their coal supplies, she might steam southward along the West coast of Africa and round the Cape, making havoc as she went of the British merchantmen which on the Cape Station alone carry on a trade worth £250,000,000. Even if she did not care to risk the operation of attacking one of our ill-defended coaling stations, like Sierra Leone, it is probable that she could obtain from her prizes, and from the supplies she might be able to get in neutral ports, sufficient coal to enable her to keep the seas. Meanwhile the alarm would have spread throughout the British Empire, and the authorities of Whitehall would have put in action all the resources at their disposal, in order to stop her course. The swiftest "greyhounds of the Atlantic" would have been purchased, commissioned, armed, and set upon her track, under the command of the smartest officers of the royal navy. Our best cruisers would have been told off to watch for her at various strategic points in the southern seas; and in anticipation of her arrival on the Indian Station the steamers of the Peninsular and Oriental Company would have been armed to resist an attack. Let us suppose that just outside Aden she is injured in a fight with one of these vessels, and soon after in her crippled condition falls a prey to the quickest of her pursuers, and is brought in triumph into the harbour of Bombay. When the shouting was over, we should begin to calculate our losses; and should probably find that they amounted to some scores of millions. If such a performance

was repeated but two or three times in the course of the war, we might emerge from the struggle a victorious but ruined nation. And, be it noted, this would be the result of a state of affairs which, so far as our naval operations were concerned, was eminently successful. If on the other hand we suppose that, as has happened more than once before, the fortune of war turns for a time against us, and instead of blockading our enemy's ports and destroying his sea-going ships, we have as much as we can do to defend our shores—in such a case sheer starvation stares us in the face. Neutral shippers could not in a moment supply a new and enormous demand. Our own corn ships would never reach us; for they would be marked down by the enemy for pursuit and capture; and with them would go not merely our trade, not merely our manufacturing preeminence, but our very life. All this may be unlikely; but I confess the possibility of it as the result, not of the utter destruction but of the mere temporary eclipse of our naval supremacy, fills me with the most unfeigned dread.

But it will be said that this view is far too gloomy. Granted that a few swift ships of the enemy might get to sea, and granted that transfer to a foreign flag would be the ruin of a great part of our trade, yet the hostile cruisers would take comparatively few prizes, and the vast majority of our ships would pursue their voyages in safety. Our losses would be better estimated at a few hundred thousands than at scores of millions. To this I reply that doubtless the actual number of vessels taken would bear a very small proportion to the thousands which fly the British flag, especially if the enemy resisted the temptation to burn his prizes at sea, and instead sent them in, as International Law requires, to the nearest

port of his own country for adjudication by a properly constituted Prize Court. But there is very little consolation to be got out of this, when we reflect that immediately it was known that British vessels were liable to capture, we should lose our carrying trade, and the rate of insurance would rise to such an extent as to seriously interfere with the transport of our own goods in our own ships. Security is the life-blood of commerce. It is quite true that neutral merchandise on board British vessels would not be good prize; but the delay and vexation involved in having the vessel brought before a Prize Court would be quite sufficient to make the neutral trader seek for his goods a vehicle not liable to be interfered with. The mere alarm of war with Russia in the spring of the present year (1885) sent up the freight on coals from Cardiff to the Baltic from 5*s.* 6*d.* a ton to 8*s.* 9*d.* a ton. The effect of a similar but much larger rise on all sorts of goods, if the outbreak of hostilities was followed by the capture of a few British vessels, I leave my readers to conjecture. We have before us in the history of the great American Civil War an example of how insecurity can, not only cripple, but actually destroy a mercantile marine. Throughout that struggle barely a dozen Southern cruisers got to sea; and of those only three had anything that can fairly be called a career. They captured but 169 Northern vessels; yet the sea-rate of insurance from the United States to England went up from 30*s.* a ton at the outbreak of the war to 65*s.* in 1862, 90*s.* in 1863, and 120*s.* in 1864. During these years nearly half a million tons of American shipping were transferred to British merchants; and the close of the war found the mercantile marine of the United States practically annihilated. They could bear up against such a calamity;

which meant for them not a serious diminution in trade, still less a cutting off of necessary supplies, but merely the crippling of one out of many branches of industry, and that one by no means the most important. To us a similar loss means nothing less than blank ruin, for it cannot be too much insisted upon that trade does not easily return to its former channels, when it has carved out for itself new ones under stress of altered circumstances. If it left us during a war, the process of winning it back would be long and toilsome.

I am quite sure that these facts are only dimly recognized by the public. It seems to be generally believed that, if need were to arise, we could defend our commerce by greatly increasing the number of our swift cruisers; and there is a strong current of opinion in favour of beginning the increase at once. I have no inclination to enter the controversy about the sufficiency or insufficiency of our present naval establishment. But it does not require any special acquaintance with maritime affairs to be able to see that no additions to our navy can secure the absolute safety of our ocean trade under the present conditions of warfare and commerce. If we double or treble the naval estimates, if we heap fresh burdens without stint on the shoulders of the already overlaid taxpayer, we shall still be in almost as dangerous a condition as we are to-day. In fact our commerce has quite outgrown our power to protect it. Some naval experts go so far as to say that in the event of war with a strong maritime power the 18,000 sailing vessels belonging to the United Kingdom would have at once to be laid up, if we did not allow them to be transferred to a foreign flag. Such a measure would condemn half our available tonnage to rot in port, while our commercial rivals rushed

in from all sides to occupy the vast gap left vacant among the ocean vehicles of the world. Even if no such drastic measure had to be adopted, there cannot be the slightest doubt that a great transfer or a great withdrawal would take place, especially among vessels plying on exposed and distant stations. No addition to our navy that it is at all possible to make would enable us to do what in the day of our most overwhelming naval superiority we never did, that is shut up every cruiser of a power like France in port all through a great war. And I have already sketched the terrible consequences of our inability to do so. The notion that we could collect our merchant vessels in large bodies, and convoy them to their destination under the protection of powerful war-ships, hardly needs serious refutation. Convoy was possible in the old days of slow sailing when vessels made one or two voyages in a year, and scores of merchantmen waited together in harbour for a favourable wind. Time was a matter of no consequence then. Now it is all important. Our shippers suffer heavy loss when a delay of four days takes place in the Suez Canal. They would as soon not send their steamers to sea at all, as keep them waiting for a fortnight till a sufficient number were assembled to form a convoy. To attempt the revival of the old system would be to make a present to neutral lines of steamers of the business now done by our great ship-owning firms and companies. Insurance by the state would not mend the matter at all, for it could not save from capture a single ship that would otherwise have been taken. If our trade is to be destroyed, it is of little consequence from a patriotic point of view whether the merchants are ruined first and the nation afterwards, or the nation first and the merchants afterwards. Twist

and turn the matter as we will, we cannot escape from the conclusion that nothing but the most unlikely conjunction of circumstances would save our commerce, and with it our national prosperity, from most serious calamity, in the event of war with a state that was even moderately powerful at sea, and that, under the stress of a temporary reverse to our navy, we might be deprived of the very necessities of life. We must learn to look these contingencies in the face, and consult how to provide against them. To sit still and take our chance would be to imitate the gambler who stakes his all upon a single throw of the dice.

What, then, is to be done? Two policies find advocates among those who have studied the question, and realized its surpassing gravity. One is to give notice to other states that we hold ourselves no longer bound by the Declaration of Paris, and intend in any future war to go back to our old practice of capturing the goods of our enemies wherever we can find them, even under a neutral flag. The other is to announce our willingness to refrain from capturing private property at sea unless it be contraband of war, and to enter into negotiations with the remaining maritime powers to get this exemption made by general agreement a rule of International Law. The advocates of the first declare that the navy has only to be released from the paralysis imposed upon it by the settlement of 1856, and it will be able to protect our trade and destroy that of our enemies, as it did in the Napoleonic wars. The advocates of the second regard its adoption as the only means whereby safety can be secured for our mercantile marine. Let us see to which side the balance of argument inclines.

The proposal to denounce the Declaration of Paris rests upon the two assumptions, that it can be done, and that when it is done the end in view will be attained. Now I venture to traverse both of these statements, and to declare in the first place that it is impossible, and in the second place that if it were possible it would not give security to our ocean trade. It is a moral impossibility, because the public opinion of the civilized world would condemn it, and that opinion would find means to make itself felt if we were hardy enough to defy it. Our own merchants and ship-owners would resent a change by which they must suffer as long as we remain at peace while other nations are at war; and every foreign trader would become in a moment an agent of active agitation against the perfidious power which, after profiting greatly as a neutral for thirty years by the rule that the flag covers the cargo, turned round, in fear of the consequences of war, and deprived other neutral merchants of the protection in virtue of which its own had almost monopolised the carrying trade of the world. This would, of course, be an exaggerated view to take, but it would have enough truth in it not only to sting us, but to stir up other governments against us. We have had experience lately of what the ill-will of one powerful state may mean to a nation which has interests all over the world. Our government offended Prince Bismarck about Colonial matters, and as if by magic a crop of difficulties sprung up around us. The Egyptian problem assumed a menacing aspect; French diplomatists became tenacious and exacting; Russia suddenly took an inconvenient interest in the Khedive's financial arrangements; and in Africa and Australasia unsatisfied claims and complicated territorial disputes arose and

flourished with the rapidity and rankness of tropical vegetation. If one power can spring such a mine upon us without either war or the remotest threat of war, we can easily imagine the condition we should be in were all the powers to be actuated by unfriendly feelings at one and the same time. The more close the intercourse between civilized states, and the greater their commerce, the easier it is for one to wound another without resort to hostilities. In 1854 at the outbreak of the Crimean war the fear that neutral nations, and especially the United States, would if their trade was interfered with by our cruisers, stretch every rule of International Law against us, caused our government to declare its intention, in conjunction with that of France, to act during the struggle upon the principles afterwards embodied in the Declaration of Paris. It would be supremely unwise to revoke now the concession which it was wise to grant then. We can ill afford to call into existence by our own acts great international leagues against us like the Armed Neutralities of a hundred years ago. In a good cause we might venture to provoke the hostility of the world; but to do so in order to put back the progress of civilization, and increase the destructiveness of warfare, would indeed be a suicidal policy. Public opinion outside England is strongly in favour of going forward instead of backward. If we choose to defy it, we should at least be sure that by doing so we shall secure the advantages we desire.

Now it is tolerably clear that we can have no such assurance. The common idea is that in the last great war with France our commerce was perfectly secure. No doubt it suffered little comparatively, so little that a

million tons of shipping were added to our mercantile marine between 1793 and 1815. But nevertheless French cruisers made many prizes. From the rupture of the peace of Amiens in 1803 to the termination of the war in 1815, our royal navy lost to the enemy 83 vessels by capture and 7 by destruction, against 134 hostile vessels captured and 37 destroyed. A power which could take a considerable number of our armed ships was well able to cause serious loss to our merchantmen. And it did so in spite of conditions of defence so favourable that they can never return, even though by a sort of moral miracle the rules of warfare were to be made the same as they were in the early days of this century. We have already seen how protection by means of convoy was then possible, and is now impossible. But that is not all. When the war was renewed in 1803 we had about 2,000,000 tons of British shipping to protect, and about 270 vessels available for its protection. Now we have about 7,000,000 tons of British shipping to protect, and about 100 vessels available for its protection. If we add, as we ought, the vessels of our distant possessions to our own, we, with our 100 cruisers, have to keep watch and ward over a tonnage of 9,000,000, and vessels to the number of 38,000. The few ships of war belonging to our colonies would be needed to defend their ports. Upon the Imperial Government would fall the task of patrolling the seas. A short calculation shews how immeasurably greater that task is now than it was at the beginning of the century. Then we had in round numbers one cruiser for every 7,400 tons of shipping; now we have one for every 90,000 tons. Then we had one cruiser for every 66 vessels of our mercantile marine, now we have

one for every 380 vessels. Then we had one cruiser for every 7,600 tons of British shipping entered and cleared at British ports during the year, now we have one for every 470,000 tons. Then we had one cruiser for every £230,000 of exports and imports, now we have one for every £7,320,000. On the face of these figures, it is clear that the protection afforded now could be nothing like as efficient as that given in the great Napoleonic war; and when we remember in addition, that in those days we imported barely 2 lbs. of wheat and flour for every unit of our population, whereas now we import 250 lbs., we shall, I think, find ample reason for the conclusion that a return to the old system of maritime warfare would be a most hazardous experiment. We cannot multiply the immense and costly vessels of to-day, as we could the small and cheaply built ships of the earlier epoch; and we cannot become again in the matter of food a self-supporting and self-sufficient nation.

The alternative naval policy remains to be considered; and I think that in what has been already said ample reason will be found for its adoption. In fact it is the only one possible under existing circumstances, if we wish to make our commerce perfectly safe, and to avoid the terrible risks of national disaster involved in the present system. We have far more to gain than any other power by the exemption of private property from belligerent capture at sea. It is unwise in the extreme to suppose that because the navy of which we are so justly proud was able a hundred years ago to ward off serious attack from a comparatively small trade, under conditions of warfare that gave it countless advantages which it does not now possess, therefore it

will secure the same immunity for a commerce of hundreds of millions scattered over every sea on the face of the globe. We might as reasonably expect to conquer France to-day with armies similar in numbers and equipment to those who won Crecy and Agincourt. Yet it is upon memories of the past that the arguments of those who object to any further change, and of those who desire to denounce the Declaration of Paris, are always based. On the other hand those who are most intimately acquainted with the circumstances of modern commerce and modern warfare are most apprehensive of calamity unless a change is made. By naval officers and ship-owners the question is discussed with a fairness and openness which leave nothing to be desired; and though there are, of course, differences of opinion, few among them will be found to say that the entire exemption of private property at sea from belligerent capture would not be infinitely preferable to the present rule. Many are strongly in favour of the principle, and would be unfeignedly glad to see it adopted as a part of our national policy.

The argument that we ought not to spare a peaceful merchantman, because she may at any time be turned into an armed cruiser does not seem to me to be very formidable. She could not be made a line-of-battle ship, and unless she could she would be of little use in naval warfare, from which capture of private property not of a contraband nature was banished. And further if any enemy of ours tried in this way to increase his fleet, we could at once beat him with his own weapons. For every swift liner he equipped we could with the greatest ease equip three; and under such circumstances he would soon give up so costly and futile a proceeding. The ad-

ditional argument that the navy would have nothing to do if commerce was free from attack merits little consideration. The entire cessation of maritime warfare could hardly be regarded as an unmixed calamity; but, for the reassurance of those who revel in ruin and destruction, it may be pointed out that both would flourish under the new order we are contemplating. Our navy would still have the navy of the enemy to fight, his ports to blockade, his coaling stations to capture, his contraband trade to destroy, and his colonies to attack. And in addition it would be required to bear its part in the defence of our own shores, and our vast possessions beyond the seas. Surely the most active and ambitious seaman would find in all these tasks an ample field for the exercise of his skill. And they would be far better done when the fruitless and harassing labour of having to protect a commerce from its very nature incapable of defence was no longer thrown upon the fleet. Public opinion should compel our rulers to move in this matter before it is too late. Other states could hardly refuse to adopt at our instance a policy which they have been advocating against us for a long time past. Once adopted it is likely to be permanent; for we should threaten to resort as against any state which infringed it, not to the rules of the Declaration of Paris, but to our previous policy of capturing enemy goods whether in hostile or neutral ships. This would at once cause every neutral state to put pressure upon the offending belligerent in the interests of its commerce, and there would be little chance of successful resistance to the naval power of Great Britain backed up by the moral force of the world. With our commerce safe, our resources for war would be multiplied a thousand fold,

and our supremacy at sea would be established on a firmer basis than ever. The race would again be to the swift and the battle to the strong; and at the call of duty the countrymen of Blake and Benbow, Rodney and Nelson need not hesitate to face the world in arms.

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